



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 585 841



**HARVARD LAW SCHOOL
LIBRARY**

T. 2

36

c

REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland.

WILLIAM T. BRANTLY,

STATE REPORTER.

VOLUME 114.

**CONTAINING CASES IN OCTOBER TERM, 1910, AND JANUARY
TERM, 1911.**

0

Published by Authority.

**BALTIMORE:
KING BROTHERS,
1911.**

COPYRIGHT 1911,
BY
W. T. BRANTLY,
For the State of Maryland

AUG 5 1911

NAMES OF THE JUDGES, ETC.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

THE COURT OF APPEALS.

HON. ANDREW HUNTER BOYD, Chief Judge.
HON. JOHN R. PATTISON, Associate Judge.
HON. JAMES ALFRED PEARCE, Associate Judge.
HON. NICHOLAS CHARLES BURKE, Associate Judge.
HON. WILLIAM H. THOMAS, Associate Judge.
HON. HAMMOND URNER, Associate Judge.
HON. JOHN PARRAN BRISCOE, Associate Judge.
HON. SAMUEL D. SCHMUCKER, Associate Judge.
*HON. SAMUEL D. SCHMUCKER, Associate Judge.
†HON. HENRY STOCKBRIDGE, Associate Judge.

THE CIRCUIT COURTS.

FIRST JUDICIAL CIRCUIT—*Worcester, Somerset, Dorchester,
and Wicomico Counties.*

HON. JOHN R. PATTISON, Chief Judge.
HON. ROBLEY D. JONES, Associate Judge.
HON. E. STANLEY TOADVIN, Associate Judge.

SECOND JUDICIAL CIRCUIT—*Caroline, Talbot, Queen Anne's,
Kent and Cecil Counties.*

HON. JAMES ALFRED PEARCE, Chief Judge.
HON. WILLIAM H. ADKINS, Associate Judge.
HON. PHILEMON B. HOPPER, Associate Judge.

*Died March 3rd, 1911.

†Appointed by the Governor, April 13th, 1911, to succeed Hon. Samuel D. Schmucker, deceased.

THIRD JUDICIAL CIRCUIT—*Baltimore and Harford Counties.*

HON. NICHOLAS CHARLES BURKE, Chief Judge
HON. GEORGE L. VAN BIBBER, Associate Judge.
HON. FRANK I. DUNCAN, Associate Judge.

FOURTH JUDICIAL CIRCUIT—*Allegany, Garrett and Washington Counties.*

HON. ANDREW HUNTER BOYD, Chief Judge.
HON. ROBERT R. HENDERSON, Associate Judge.
HON. MARTIN L. KEEDY, Associate Judge.

FIFTH JUDICIAL CIRCUIT—*Carroll, Howard and Anne Arundel Counties.*

HON. WILLIAM H. THOMAS, Chief Judge.
HON. JAMES R. BRASHEARS, Associate Judge.
HON. WILLIAM H. FORSYTHE, JR., Associate Judge.

SIXTH JUDICIAL CIRCUIT—*Montgomery and Frederick Counties.*

HON. HAMMOND URNER, Chief Judge.
HON. JOHN C. MOTTER, Associate Judge.
HON. EDWARD C. PETER, Associate Judge.

SEVENTH JUDICIAL CIRCUIT—*Prince George's, Charles, Calvert, and St. Mary's Counties.*

HON. JOHN PARRAN BRISCOE, Chief Judge.
HON. BENJAMIN HARRIS CAMALIER, Associate Judge.
HON. FILLMORE BEALL, Associate Judge.

NAMES OF JUDGES, &c.

▼

EIGHTH JUDICIAL CIRCUIT—*Baltimore City*

Hon. HENRY DAVID HARLAN, Chief Judge.
Hon. JOHN J. DOBLER, Associate Judge.
Hon. HENRY STOCKBRIDGE, Associate Judge.
Hon. GEORGE MATTHEWS SHARP, Associate Judge.
Hon. ALFRED S. NILES, Associate Judge.
Hon. THOMAS IRELAND ELLIOTT, Associate Judge.
Hon. JAMES P. GORTER, Associate Judge.
Hon. CHARLES W. HEUISLER, Associate Judge.
Hon. HENRY DUFFY, Associate Judge.
Hon. H. ARTHUR STUMP, Associate Judge.
*Hon. CARROLL T. BOND, Associate Judge.

Attorney-General.

ISAAC LOBE STRAUS, Esq.

Clerk of the Court of Appeals.

CALEB C. MAGRUDER, Esq.

*Appointed by the Governor, April 13th, 1911, to succeed Hon. Henry Stockbridge, appointed Associate Judge of the Court of Appeals.

TABLE OF CASES REPORTED.

Alford <i>ats.</i> Stouffer.....	110
Badders <i>v.</i> O'Brien.....	451
Baltimore City <i>ats.</i> Hannis Distilling Co.....	678
Baltimore City <i>ats.</i> Hanrahan.....	517
Balto. & Ohio R. Co. <i>v.</i> Rueter.....	687
Balto. & Ohio R. Co. <i>ats.</i> St. James Church.....	442
Balto. & Ohio R. Co. <i>ats.</i> Webb.....	216
Balto. & Ohio R. Co. <i>v.</i> Welch.....	536
Berman <i>v.</i> Elm Loan Ass'n.....	191
Bettendorf Co. <i>v.</i> Field.....	487
Bollman <i>ats.</i> Christhlf.....	477
Brehm <i>v.</i> P. B. & W. R. Co.....	302
Brengle <i>v.</i> Tucker.....	597
Carman <i>ats.</i> Russell.....	25
Cheney <i>ats.</i> Townes.....	362
Christhlf <i>v.</i> Bollman.....	477
Cohen <i>ats.</i> German Union Co.....	130
Colburn <i>v.</i> Union Infirmary.....	94
Colonial Trust Co. <i>ats.</i> Gerke.....	289
Commercial Realty Co. <i>v.</i> Dorsey.....	172
Connor <i>ats.</i> Consolidated Gas Co.....	140
Consolidated Gas Co. <i>v.</i> Connor.....	140
Consolidated Gas Co. <i>ats.</i> Leviness.....	559
Corporation, Etc., <i>ats.</i> Dinneen.....	589
Crown Cork & Seal Co. <i>ats.</i> Snowden.....	650
Cull <i>v.</i> Wheltle.....	58
Dettering <i>v.</i> Levy.....	273
Diamond <i>v.</i> Shriver.....	643
Dickson & Tweeddale <i>v.</i> Fowler.....	344
Didier <i>v.</i> Merryman.....	434
Dietrich <i>ats.</i> Latrobe.....	8

Dinneen <i>v.</i> The Corporation, Etc.....	589
Disharoon <i>v.</i> Waters.....	456
Dorsey <i>ats.</i> Commercial Realty Co.....	172
Duvall <i>v.</i> Md. Electric Rys. Co.....	298
Elm Loan Ass'n <i>ats.</i> Berman.....	191
Enterprise Mfg. Co. <i>v.</i> Oppenheim.....	369
Field <i>ats.</i> Bettendorf Co.....	487
First National Bank <i>v.</i> White.....	615
Fitzgerald <i>v.</i> Rawlings.....	470
Foreman <i>v.</i> Sadler's Executors.....	574
Fowler <i>ats.</i> Dickson & Tweeddale.....	344
Gerke <i>v.</i> Colonial Trust Co.....	289
German Union Co. <i>v.</i> Cohen.....	130
Ginn & Co. <i>ats.</i> National Exchange Bank.....	181
Ginther <i>v.</i> Townsend.....	122
Hannis Distilling Co. <i>r.</i> Baltimore City.....	678
Hanrahan <i>v.</i> Baltimore City.....	517
Harvey <i>ats.</i> Suman.....	241
Hawken <i>ats.</i> Long.....	234
Hettinger <i>v.</i> Harvey.....	241
High <i>v.</i> Pollock.....	580
Hirsch <i>ats.</i> Hummelshime.....	39
Holzman <i>v.</i> Wager.....	322
Huff <i>v.</i> Simmers.....	548
Humbird, <i>Ex Parte</i>	627
Hummelshime <i>v.</i> Hirsch.....	39
Jones <i>v.</i> Ortel.....	205
Kearney <i>ats.</i> Piedmont Coal Co.....	496
Knickerbocker Co. <i>ats.</i> Sumwalt Co.....	403
Kolken <i>ats.</i> United Rys. Co.....	160

TABLE OF CASES REPORTED.

ix

Latrobe <i>v.</i> Dietrich.....	8
Leitch <i>v.</i> Leitch.....	336
Leviness <i>v.</i> Consol. Gas Co.....	559
Levy <i>ats.</i> Dettering.....	273
Lilley <i>v.</i> Phila. B. & W. R. Co.....	1
Long <i>v.</i> Hawken.....	234
Md. Electric Rys. Co. <i>ats.</i> Duvall.....	298
Mayor & C. C. of Balto. <i>ats.</i> Hannis Distilling Co....	678
Mayor & C. C. of Balto. <i>ats.</i> Hanrahan.....	517
Merryman <i>ats.</i> Didier.....	434
Mulfinger <i>v.</i> Mulfinger.....	463
National Exchange Bank <i>v.</i> Ginn & Co.....	181
Neale <i>v.</i> Peverley.....	198
O'Brien <i>ats.</i> Badders.....	451
Oppenheim <i>ats.</i> Enterprise Mfg. Co.....	369
Ortel <i>ats.</i> Jones.....	205
Peverley <i>ats.</i> Neale.....	198
Phila. B. & W. R. Co. <i>ats.</i> Brehm.....	302
Phila. B. & W. R. Co. <i>ats.</i> Lilley.....	1
Piedmont Coal Co. <i>v.</i> Kearney.....	496
Pollock <i>ats.</i> High.....	580
Rawlings <i>ats.</i> Fitzgerald.....	470
Rowland <i>ats.</i> Semmes.....	260
Rueter <i>ats.</i> Balto. & Ohio R. Co.....	687
Russell <i>v.</i> Carman.....	25
Russell <i>ats.</i> Slagle.....	418
Sadler's Executors <i>ats.</i> Foreman.....	574
Safe Deposit and Trust Co. <i>ats.</i> Foreman.....	574
St. James Church <i>v.</i> Balto. & Ohio R. Co.....	442
School Commissioners <i>v.</i> Rowland.....	260
Semmes <i>v.</i> Rowland.....	260

Shriver <i>ats.</i> Diamond.....	643
Simmers <i>ats.</i> Huff.....	548
Slagle <i>v.</i> Russell.....	418
Snowden <i>v.</i> Crown Cork & Seal Co.....	650
Sparr <i>v.</i> United R'ys Co.....	316
Stouffer <i>v.</i> Alford.....	110
Stouffer <i>v.</i> Wolfkill.....	603
Suman <i>v.</i> Harvey.....	241
Sumwalt Co. <i>v.</i> Knickerbocker Co.....	403
Townes <i>v.</i> Cheney.....	362
Townsend <i>ats.</i> Ginther.....	122
Tucker <i>ats.</i> Brengle.....	597
Union Infirmary <i>ats.</i> Colburn.....	94
United Rys. Co. <i>v.</i> Kolken.....	160
United R'ys Co. <i>ats.</i> Sparr.....	316
Wager <i>ats.</i> Holzman.....	322
Waters <i>ats.</i> Disharoon.....	456
Webb <i>v.</i> Balto. & Ohio R. Co.....	216
Welch <i>ats.</i> Balto. & Ohio R. Co.....	536
Whelple <i>ats.</i> Cull.....	58
White <i>ats.</i> First National Bank.....	615
Wolfkill <i>ats.</i> Stouffer.....	603

TABLE OF CASES CITED.

IN THE OPINIONS OF THE COURT.

Acker, Merrill & C. Co. v. McGaw..	106	Md.	536.....	413, 554, 699
Adams v. Beall.....	67	Md.	53.....	24
Aetna Nat. Bank v. Water Power Co.....	} 58	Mo. App.	523.....	694
Albert v. Albert.....				
Albert v. Hamilton.....	74	Md.	534.....	657
Alexander v. M. & C. C.....	76	Md.	309.....	610
Allen v. Duffle.....	53	Md.	104.....	344
American Iron Co. v. Beall.....	43	Mich.	4.....	680
American Smelting Co. v. Colorado..	101	Md.	425.....	195
American Tobacco Co. v. Strickling..	204	U. S.	103.....	682
Amick v. Butler.....	88	Md.	500.....	279
Andrews v. Lembech.....	111	Ind.	578.....	477
A. W. & B. R. R. Co. v. State, } use of Hickox.....	46	Ohio St.	40.....	237
Arnd v. Heckert.....	104	Md.	659.....	314
Arthur v. Cole.....	108	Md.	300.....	116, 121
Ashley v. Ashley.....	56	Md.	102.....	333
Atchison v. Morris.....	3	Sim.	149.....	476
Atkinson v. Newcastle.....	11	Fed. Rep.	582.....	238
Atlantic Coast Line Divid'd Cases..		L. R. 2 Exch. Div.	441....	158
Attorney-General v. Dashiell.....	102	Md.	73.....	634
	5	H. & J.	392, 6 H. & J. 1....	665
B. & L. Railroad Co. v. Faunce....	6	Gill,	68.....	189
Babb v. Read <i>et al.</i>	5	Rawle,	151.....	659
Bacon v. Robertson.....	18	Howard,	480.....	570
Balch v. Co. Commrs.....	103	Mass.	115.....	448
Balto. Bldg. Assn. v. Grant.....	41	Md.	569.....	175
Baltimore City v. Day.....	89	Md.	555.....	576
Baltimore v. Keyser.....	72	Md.	115.....	438
Baltimore v. Lefferman.....	4	Gill,	425.....	189
Balto. City v. Schaub.....	96	Md.	534.....	400
Baltimore v. Schnitker.....	84	Md.	43.....	531
Balto. City v. United Rys. Co.....	108	Md.	71.....	565, 569, 572
Balto. City Pass. R. R. Co. v. } Wilkinson.....	30	Md.	229.....	413
Balto. Per. B. & L. Soc. v. Smith..	54	Md.	202.....	129
Baltimore Retort Co. v. Mall.....	65	Md.	93.....	657, 677
Balto. Traction Co. v. Appel.....	80	Md.	603.....	168
B. & O. R. R. v. Allison.....	62	Md.	487.....	543, 548
B. & O. R. R. v. Baugh.....	149	U. S.	368.....	283

B. & O. R. R. Co. v. Co. Commrs. of Howard County.....	113	Md. 404.....	416
B. & O. R. Co. v. Logsdon.....	101	Md. 362.....	138
B. & O. R. Co. v. State, use of Mall.....	66	Md. 59.....	544
B. & O. R. Co. v. Waltemyer.....	47	Md. 331.....	444
B. & O. R. Co. v. Waters.....	105	Md. 397.....	447
Balto. & Pot. R. Co. v. Reany.....	42	Md. 130.....	522, 531
Baltzell v. Church Home.....	110	Md. 244.....	655, 665, 670
Bank of Bristol v. B. & O. R. Co....	99	Md. 661.....	697, 698
Banks v. McCosker.....	82	Md. 521.....	116
Banks v. McCosker.....	84	Md. 297.....	116
Baptist Church v. Shively.....	67	Md. 493.....	656
Barabatz v. Kabat.....	91	Md. 53.....	545
Barnum v. Baltimore.....	62	Md. 275.....	656
Bashor v. Forbes.....	36	Md. 166.....	196
Bauer v. Bauer.....	82	Md. 214.....	466
Bealty & Ritchie v. Kurtz <i>et al.</i>	2	Peters. 556.....	659
Bell v. Josselyn.....	3	Gray. 309.....	157
Beloit v. Morgan.....	7	Wallace. 619.....	610
Belt R. R. Co. v. Sattler.....	102	Md. 595.....	512
Benesch v. Well.....	69	Md. 276.....	693
Bennett v. Humane Society.....	91	Md. 10.....	106, 655, 666
Birely v. Dodson.....	107	Md. 233.....	119
Biggs v. Langhammer.....	103	Md. 102.....	554
Black v. Bank of Westminster.....	96	Md. 415.....	116
Blake v. Stump.....	72	Md. 172.....	427, 432
Blanchard v. Sheldon.....	43	Vt. 514.....	674
Blatchford v. Ross.....	54	Barb. 48.....	570
Blondell v. Consol. Gas Co.....	89	Md. 748.....	159
Board v. Van Hoesen.....	87	Mich. 540.....	448
Boardman v. Lessees of Reed.....	6	Pet. 328.....	462
Boggs v. Inter-American, etc., Co....	105	Md. 371.....	684
Bolghiano v. Gilbert Lock Co.....	73	Md. 132.....	235, 236, 239
Bolz v. Crone.....	64	Kansas, 571.....	237
Bonaparte v. Wiseman.....	89	Md. 21.....	532
Bowers v. Gallagher.....	62	Md. 402.....	595
Bowie v. Ghiselin.....	30	Md. 553.....	454
Boyle v. Peabody Heights Co. of Baltimore City.....	46	Md. 623.....	486
Brauer v. Refrigerating Co.....	99	Md. 381.....	440
Brawner v. Franklin.....	4	Gill. 463.....	24
Brewer v. Bowersox.....	92	Md. 575.....	36
Bridge Co. v. Dix.....	6	Howard. 507.....	447
Brook v. Winters.....	39	Md. 505.....	554
Brookes v. Chesley.....	4	H. & McH. 295.....	235
Brown v. Bragunier.....	79	Md. 234.....	47
Brown v. State.....	72	Md. 475.....	544
Brown v. Thompkins.....	49	Md. 431.....	662, 665
Brown v. Ward.....	53	Md. 387.....	612

Brown v. Werner.....	40	Md. 15.....	511
Bruce v. Garden.....		L. R. 5 Ch. App. 32.....	478
Bryan v. Virginia.....	135	U. S. 693.....	496
Buchanan v. Lorman.....	3	Gill, 77.....	461
Buchanan v. Pue.....	6	Gill, 112.....	189
Burgher v. Humphrey.....	41	Ohio St. 340.....	501, 502
Burk v. Luthicum.....	59	Md. 344.....	23
Butler v. Watkins.....	80	U. S. 456, 464.....	119
Cahill v. Baltimore.....	93	Md. 288.....	531
Callaway v. Hubner.....	99	Md. 534.....	208
Cameron v. Roberts.....	87	Wis. 291.....	238
Carlin v. Chappell.....	101	Pa. 350.....	501, 502, 508
Carroll v. Manganese Safe Co.....	111	Md. 252.....	545
Carstairs v. Cochran.....	95	Md. 488, 193 U. S. 10.....	681, 686
Carter v. Md. & Pa. R. Co.....	112	Md. 599.....	438
Cassidy v. Shimmmin.....	122	Mass. 409.....	570
Cathcart v. Bacon.....	47	Minn. 34.....	430
Cem. Co. v. Cem. Asso.....	93	Texas, 509.....	448
Central Ga. R. R. Co. v. Eichberg.....	107	Md. 372.....	684
Cherbonnier v. Evitts.....	56	Md. 276.....	611
Ches. B. R. R. Co. v. Donahue.....	107	Md. 128.....	543, 548
C. & P. R. Co. v. B. & O. R. Co.....	57	Md. 267.....	450
C. & P. Tel. Co. v. Baltimore.....	89	Md. 710.....	228
Chicago, etc., R. Co. v. Brandan....	81	Mo. App. 1.....	501
Chilton v. Brooks.....	72	Md. 554.....	197
Citizens' Bank v. Grafflin.....	31	Md. 507.....	189
Citizens' Bank v. Schwarzschild....	109	Va. 539.....	187
Clark v. Allen.....	11	R. I. 439.....	477
Clark v. Callahan.....	105	Md. 600.....	256
Clement v. Packer.....	125	U. S. 309.....	462
Clements v. Smith.....	9	Gill, 156.....	21
Cleveland Rolling Mills v. Rhodes....	121	U. S. 204.....	401
Clogg v. McDaniel.....	89	Md. 416.....	476
Colgate D. Owings' Case.....	1	Bland, 402.....	256
Coleman v. Applegarth.....	68	Md. 21.....	649
Coleman v. Chadwick.....	80	Pa. 81.....	501, 506
Collinsville Granite Co. v. Phillips....	123	Ga. 830.....	501
Colton v. Drivers' Building Asso....	90	Md. 94.....	188
Columbian Iron Works v. Douglas....	84	Md. 64.....	399
Com. Assoc. v. Beecher.....	53	Conn. 557.....	448
Commercial & Farmers' Nat. Bk. } v. First Nat. Bank.....	30	Md. 11.....	188
Consolidated Gas Co. v. Crocker....	82	Md. 124.....	152
Consolidated Gas Co. v. Getty.....	96	Md. 688.....	152, 512
Consolidated Ry. Co. v. Armstrong....	92	Md. 554.....	169, 546
Consolidated Ry. Co. v. Rifcowitz....	89	Md. 383.....	168, 169
Cook v. Lamotte.....	15	Beav. 239.....	612
Cooke v. Cooke.....	43	Md. 522.....	119

Cooper v. Wyman.....	122	N. C. 785.....	238
Corson's Appeal.....	133	Pa. St. 438.....	477
Coulborn v. Fleming.....	78	Md. 210.....	240
County Commrs. v. School Commrs..	77	Md. 290.....	92
Cover v. Myers.....	75	Md. 406.....	116, 121
Cox v. Hill.....	6	Md. 287.....	677
Coyne v. Supreme Conclave.....	106	Md. 54.....	256
Creamer v. Stephenson.....	15	Md. 211.....	196
Crease v. Babcock.....	10	Met. 525.....	570
Crossman v. Kelsner.....	8	L. R. A. (N. S.) 698.....	256
Culbreth, Admr., v. Smith.....	69	Md. 463.....	333
Cullum v. Bevans.....	6	H. & J. 469.....	693
Daggett v. Davis.....	53	Mich. 35.....	215
Dalby v. Ins. Co.....	15	C. B. 365.....	476
Daniels v. New England Cotton Yarn Co.....	188	Mass. 260.....	280
Dashiell v. Attorney-General.....			
David v. Hamblin.....	51	Md. 540.....	119
Davis v. Cem. Co.....	65	Kan. 563.....	447
Davis v. Clinton.....	54	Ia. 50.....	158
Davis v. Denny.....	94	Md. 32.....	612
Davis v. Reed.....	14	Md. 156.....	440
Dawson v. Western Md. R. R. Co..	107	Md. 70.....	577
De Ford v. Keyser.....	30	Md. 179.....	532
De Ford v. McWatty.....	82	Md. 178.....	203
De Grange v. De Grange.....	96	Md. 614.....	677
Delamater v. Chappell.....	48	Md. 253.....	401
De Lauder v. Balto. County.....	94	Md. 7.....	521
Denmead v. Coburn.....	15	Md. 44.....	366
Derritt v. Bowman.....	61	Md. 526.....	649
Devecmon v. Devecmon.....	43	Md. 346.....	333, 334
Dietus v. Fuas.....	8	Md. 158.....	213
Diggs v. Fidelity & Deposit Co.....	112	Md. 50.....	569
Dignan v. Altoona Coal & Coke Co..	222	Pa. 390.....	503
Dixon v. Dixon.....	92	Md. 442.....	129
Dixon v. Spencer.....	59	Md. 249.....	195
Doan v. Ascension Parish.....	103	Md. 662.....	656, 670
Dolfield v. Western Md. R. Co.....	107	Md. 584.....	449
Dorsey v. Dashiell.....	1	Md. 207.....	175
Dorsey v. Hobbs.....	10	Md. 412.....	460
Dougherty v. Gring.....	89	Md. 544.....	367
Dove v. Tarr.....	128	Mass. 38.....	249
Dubreull v. Gaither.....	98	Md. 544.....	183
Dumay v. Sanchez.....	71	Md. 512.....	240
Durgan v. Miller.....	8	Vroom, 182.....	237
Duval v. Wilmer.....	88	Md. 66.....	595

CASES CITED.

xv

Eckhardt v. Lazaretto Co.....	90	Md. 188.....	283
Edelen v. Edelen.....	11	Md. 415.....	454
Ege v. Hering.....	108	Md. 391.....	656
Elder v. Warfield.....	7	H. & J. 391.....	625
Ellason v. Grove.....	85	Md. 225.....	595
Ellicott v. Martin.....	6	Md. 509.....	699
Elliot v. Brent.....	6	Mackey, 103.....	343
Ellis v. McNaughton.....	76	Mich. 237.....	157
Elliston v. Reacher.....	2	Ch. D. 374.....	578
Emanuel v. Constable.....	3	Russ. 436.....	338
Emerick v. Coakley.....	35	Md. 193.....	476
Ennmitt v. New York.....	128	N. Y. 117.....	89
Erb v. Grimes.....	94	Md. 92.....	344
Erhardt v. Balto. Monthly Meet- ing of Friends.....	93	Md. 669.....	656
Erickson v. Mich. L. & I. Co.....	50	Mich. 604.....	501
Estep v. Morris.....	38	Md. 417.....	340, 342
Falth v. Bowles.....	86	Md. 13.....	576
Farren v. Dameron.....	99	Md. 337.....	178
Fells v. Read.....	3	Vesey, 70.....	659
Burkham.....	32	Mich. 328.....	187
First Nat. Bank of Detroit v. } First Nat. Bk. of St. Paul v. Ames.	39	Minn. 179.....	237
Foley v. Crow.....	37	Md. 51.....	21
Foster v. Banbury.....	3	Sim. 40.....	338
Fowble v. Kemp.....	92	Md. 637.....	681
Freaner v. Yingling.....	37	Md. 401.....	195, 196
Fulmer v. Williams.....	122	Pa. 191.....	513
Gaither v. Gaither.....	3	Md. Ch. 158.....	254, 255
Garling v. Bechtel.....	41	Md. 305.....	494
Gas Light Co. v. Colliday.....	25	Md. 1.....	233
George v. Andrews.....	60	Md. 26.....	197
George's Creek Coal & Iron Co. } v. Central Coal Co.	40	Md. 425.....	444
George's Creek C. & I. Co. v. } County Commissioners.....	59	Md. 255.....	189
Giblan v. National Laborers' Union..	2	K. B. 600 (1903).....	414
Gilbert v. Arnold.....	30	Md. 29.....	440
Gilman v. Smith.....	71	Md. 174.....	649
Glittings v. Mayhew.....	6	Md. 113.....	659
Glenson v. Suskin.....	110	Md. 137.....	278, 280, 287
Gottschalk v. Stein.....	69	Md. 51.....	438
Gotwalt v. Neal.....	25	Md. 434.....	358
Gray v. Farmers' Natl. Bank.....	81	Md. 631.....	195
Gray v. Nelson.....	77	Iowa, 69.....	674, 677
Gregg v. Sumner.....	21	Ill. App. 110.....	237
Gregory v. New York.....	113	N. Y. 416.....	89

<i>Griffin v. Fairmount Coal Co.</i>	59	W. Va. 480.....	501, 503
<i>Griffith v. Shipley</i>	74	Md. 591.....	116, 121
<i>Groff v. Hansel</i>	33	Md. 164.....	116
<i>Groome v. Gwinn</i>	43	Md. 572.....	85
<i>Gross v. Burneston</i>	91	Md. 383.....	602
<i>Grymes v. Sanders</i>	93	U. S. 55.....	21
<i>Gunther v. Gunther</i>	69	Md. 560.....	466
<i>Gurley v. Hiteshue</i>	5	Gill, 223.....	129
<i>Hale v. Hale</i>	146	Ill. 257.....	570
<i>Halle v. Newbold</i>	69	Md. 265.....	577
<i>Hallyday v. Southern Agency</i>	100	Md. 294.....	433
<i>Halsey v. Convention</i>	75	Md. 275.....	656, 666, 669
<i>Halsey v. Stewart</i>	1	Southard (4 N. J. L.), 420.....	237
<i>Hamblin v. Toledo Co.</i>	{	47 U. S. App. 442, 36 L. R. A.	
		820.....	570
<i>Hammett v. Shanks</i>	41	Md. 201.....	342
<i>Hannis Distilling Co. v. Baltimore</i>	216	U. S. 285.....	681
<i>Hannon v. The State</i>	9	Gill, 440.....	675
<i>Hanson v. Little Sisters of the Poor</i> , 79		Md. 434.....	656
<i>Harding v. Amer. Glucose Co.</i>	182	Ill. 551.....	685
<i>Hardy v. Chesapeake Bank</i>	51	Md. 562.....	188
<i>Harford County v. Wise</i>	75	Md. 38.....	535
<i>Harmon v. Harwood</i>	58	Md. 1.....	84
<i>Harris v. Pue</i>	39	Md. 535.....	342
<i>Harwood v. Marshall</i>	9	Md. 83.....	49, 50
<i>Hatcher v. McDermot</i>	103	Md. 78.....	314
<i>Hatcheson v. Tilden et al.</i>	4	H. & McH. 279.....	55
<i>Havre de Grace v. Fletcher</i>	112	Md. 563.....	132
<i>Hawkins v. State</i>	81	Md. 314.....	49
<i>Hayes v. Shields</i>	2	Yeates, 222.....	237
<i>Hayes v. Wells</i>	34	Md. 515.....	195
<i>Hayne's Case</i>	12	Cokes R. 113.....	676
<i>Heard v. Eldridge</i>	109	Mass. 258.....	637
<i>Heller v. Marine Bank</i>	89	Md. 622, 623.....	572
<i>Henderson v. Henderson</i>	3	Hare, 115.....	609
<i>Herrick v. Humphrey Hardware Co.</i>	73	Neb. 809.....	214
<i>Herzberg v. Adams</i>	39	Md. 312.....	444
<i>Heying v. United Rys. Co.</i>	100	Md. 281.....	171, 321
<i>Higgins v. Carlton</i>	28	Md. 115.....	342, 544, 602
<i>Hite v. Hite</i>	93	Ky. 257.....	638
<i>Hoffman v. Watson</i>	109	Md. 532.....	258, 259
<i>Holbrook v. Holbrook</i>	12	L. R. A. (N. S.) 769.....	686, 638
<i>Hoover v. Smith</i>	96	Md. 393.....	248
<i>Hopkins v. P., W. & B. R. R. Co.</i>	94	Md. 265.....	444
<i>Horn Silver Mining Co. v. State</i>	{	143 U. S. 315.....	685
of New York.....			
<i>Horner v. Parkhurst</i>	71	Md. 116.....	178
<i>Horner v. Watson</i>	79	Pa. 242.....	502

CASES CITED.

xvii

Horsey v. Hough.....	38	Md. 139.....	203
Huddeson v. Prizer.....	9	Phila. 188.....	237
Hunter v. Atkins.....	3	Myle & Keene, 113.....	612
Hurn v. Soper.....	6	H. & J. 276.....	119
Idaho, The.....	93	U. S. 575.....	695
Illinois Central R. R. Co. v. Foulke.....	191	Ill. 57.....	157
In re Healey.....	53	Vt. 694.....	237
In re 22nd Street.....	133	N. Y. 329.....	448
Ins. Co. v. Flack.....	3	Md. 341.....	475
Ives' Case.....	144	U. S. 408.....	5
James v. Jenkins.....	34	Md. 1.....	595
Jay v. Michael.....	92	Md. 198.....	439
Jenkins v. Long.....	8	Md. 143.....	366
Joesting v. Baltimore.....	97	Md. 594.....	495
Johnson v. Hines.....	61	Md. 131.....	676
Johnson v. Van Epps.....	110	Ill. 562.....	477
Jones v. Just.....		L. R. 3 Q. B. 197.....	177
Jones v. Wagner.....	66	Pa. 429.....	501, 503
Juneau Bank v. McSpedan.....	14	Fed., Case No. 7582.....	238
Junkins v. Sullivan.....	110	Md. 539.....	699
Kalbach v. Clark.....	133	Iowa, 215.....	637
Kean's Case.....	61	Md. 154.....	5
Kean v. Rizer.....	90	Md. 507.....	50
Keenan's Case.....	202	Pa. 107.....	314
Kehoe's Case.....	83	Md. 434.....	5, 545, 546
Kennedy v. McCann.....	101	Md. 651.....	466
Kilpatrick v. Baltimore.....	81	Md. 195.....	576
Kistler v. Thompson.....	158	Pa. 139.....	506
Knickerbocker Ice Co. v. Gardiner Dairy Co.....		107	Md. 556.....414, 415
Kroh v. Smoot.....	62	Md. 172.....	92
Lake v. Thomas.....	84	Md. 623.....	195, 197
Lake Roland El. R. R. Co. v. Baltimore City.....		77	Md. 377.....227
Lake Roland Co. v. Frick.....	86	Md. 259.....	231
Lake Roland Co. v. McKewen.....	80	Md. 593.....	168
Lake Roland R. W. Co. v. Webster.....	81	Md. 529.....	230
Lampasas v. Bell.....	180	U. S. 283, 284.....	494
Lampert v. La Clede Gas Co.....	7	Western Rep. 745.....	158
Lane v. Eaton.....	69	Minn. 141.....	667
Lang v. Wagner.....	52	Md. 310.....	416
Larmour v. Rich.....	71	Md. 369.....	585
Lee v. Lee.....	6	G. & J. 313.....	454
Legg v. Annapolis.....	42	Md. 203.....	47
Leopard v. Canal Co.....	1	Gill, 222.....	175, 413

<i>Levering v. Levering</i>	64	Md. 414.....	454
<i>Lincoln v. Claffin</i>	74	U. S. 132.....	119
<i>Lindsay v. Wilson</i>	103	Md. 252.....	602
<i>Linz v. Schuck</i>	106	Md. 220.....	357
<i>Littleton v. Wells Council</i>	98	Md. 453.....	673
<i>Littleton v. Wells, etc. Council</i>	98	Md. 456, 100 Md. 416....	658
<i>Livezy v. Miller</i>	61	Md. 342.....	432
<i>Lloyd v. Catlin Coal Co.</i>	210	Ill. 460.....	501
<i>Lloyd v. Loaring</i>	6	Ves. 773.....	659
<i>Long v. Ragan</i>	94	Md. 404.....	440
<i>Love v. Francis</i>	63	Mich. 192.....	674
<i>Lurman v. Hubner</i>	75	Md. 273.....	203
<i>Lyell v. Goodwin</i>	4	McLean, 29.....	238
<i>McAleer v. Horsey</i>	35	Md. 461.....	119
<i>McComas v. Amos</i>	29	Md. 120.....	258
<i>McCreary v. McCreary</i>	5	G. & J. 157.....	196
<i>McElderry v. Flanagan</i>	1	H. & G. 308.....	535
<i>McGrath v. Gegner</i>	77	Md. 331.....	400
<i>McMahon's Case</i>	39	Md. 438.....	543
<i>McMahon's Case</i>	97	Md. 487.....	7
<i>McNab v. United Rys. Co.</i>	94	Md. 719.....5, 7, 170,	321
<i>McShane v. Hazlehurst</i>	50	Md. 131.....	20
<i>McShane v. Howard Bank</i>	73	Md. 155.....	195
<i>Mahe w v. Rosser</i>	103	Pac. 674.....	88
<i>Mallette v. British Assurance Co.</i> ...	91	Md. 481.....	535
<i>Manufacturers' Bank v. Swift</i>	70	Md. 515.....184,	190
<i>Marine Bank v. Heller</i>	94	Md. 216.....	610
<i>Martin v. Baltimore City</i>	109	Md. 260.....	433
<i>Martin v. Bason</i>	76	Arkansas, 160.....	237
<i>Marvin v. Brewster Ir. Min. Co.</i> ...	55	N. Y. 538.....	501
<i>Massey v. Colville</i>	45	N. Y. Law, 119.....	237
<i>Matter of Board of Street Opening</i> ...	133	N. Y. 333.....	448
<i>Matter of Deansville C. Assn.</i>	66	N. Y. 573.....	448
<i>Matter of James</i>	146	N. Y. 96.....	638
<i>Matter of Rogers</i>	161	N. Y. 108.....	641
<i>Matthews v. Tufts</i>	87	N. Y. 568.....	237
<i>Mears v. Moulton</i>	30	Md. 142.....659, 669,	672
<i>Meldling v. United Rys Co.</i>	97	Md. 76.....	314
<i>Merchants' Nat. Bank v. Nat. Bk.</i>	} 139	Mass. 518.....	184
of Commonwealth.....			
<i>M. E. Church v. Jackson Square</i>	} 84	Md. 173.....	667
Church.....			
<i>M. E. Church v. Warren</i>	28	Md. 338.....668,	677
<i>Meyer & Ewaldt v. Grafflin</i>	31	Md. 357.....	625
<i>Mickle v. Douglas</i>	75	Iowa, 78.....501,	502
<i>Midland Nat. Bank v. Mo., Kan.</i>	} 62	Mo. App. 531.....	698
& Texas R. R. Co.....			
<i>Miles v. McCullough</i>	1	Binney, 77.....	237

CASES CITED.

xix

Miles v. Penn. Coal Co.....	217	Pa. 449.....	502
Miles v. Penna. Coal Co.....	10	Am. & Eng. An. Cases, 874	503
Miles v. Stevenson.....	80	Md. 358.....	85
Milholland v. Whalen.....	89	Md. 212.....	467
Millslagle's Case.....	73	Md. 74.....	545
Miners' Bank v. Snyder.....	100	Md. 57.....	494
Minot v. Tappan.....	122	Mass. 536.....	249
Missionary Society v. Mitchell.....	93	Md.....	666
Mitchel v. Seipel.....	53	Md. 251.....	595
Mitchell v. Huron.....	53	Mich. 541.....	237
Montell v. Con. Coal Co.....	39	Md. 164.....	344
Monticello Distilling Co. v. Balti- more City.....	} 90	Md. 416.....	681, 685
Moores v. Bel Air.....		Md. 397.....	450
Morice v. Bishop of Durham.....	16	Vesey. 521.....	667
Mt. Vernon Co. v. Teschner.....	108	Md. 158.....	211
Mullen v. Sanborn.....	79	Md. 364.....	239
Mulligan v. Jordan.....	50	N. J. Eq. 364.....	578
Murray v. Wilcox.....	122	Iowa, 189.....	238
Mutual Life Ins. Co. v. Armstrong.....	117	U. S. 491.....	119
My Maryland Lodge v. Adt.....	100	Md. 238.....	658, 673
Nagengast v. Alz.....	93	Md. 525.....	438
Nat. Bk. of N. J. v. Berrall.....	70	N. J. Law, 757.....	187
Needles v. Martin.....	33	Md. 609.....	255
Neller & Warren v. Kelly.....	69	Pa. St. 403.....	214
Nelson Bethel Clothing Co. v. Pitts.....	131	Ky. 65.....	280
Neubeur's Case.....	62	Md. 401.....	5, 7, 171
New & Sons v. Taylor.....	82	Md. 40.....	240
Newbold v. Peabody Heights Co....	70	Md. 499.....	577, 578
New Windsor v. Stocksedale.....	95	Md. 190.....	438
N. Y. C. & H. R. v. M. G. L. Co....	63	N. Y. 334.....	448
N. Y., L. E., etc. Co. v. Pennsylvania.....	153	U. S. 628.....	682
N. Y. Life Ins. Co. v. Gilhooley....	47	At. Reporter, 494.....	129
N. Y. Mining Co. v. Midland Co....	99	Md. 506.....	450
N. Y., P. & N. Ry. Co. v. Bates.....	68	Md. 192.....	175
Nichols v. Horton.....	14	Fed. Rep. 330.....	238
Nicholson v. Schmucker.....	81	Md. 465.....	197
Nickerson v. Bridgeport.....	46	Conn. 24.....	157
Nickerson v. Nickerson.....	28	Md. 332.....	674
Noonan v. Pardee.....	200	Pa. 474.....	501, 512
Norrington v. Wright.....	115	U. S. 188.....	400, 402
Obendorff v. Union Bank.....	31	Md. 131.....	195
Obert v. Denna.....	140	Mo. 476.....	530
Oddie v. National City Bank.....	45	N. Y. 735.....	186
Offutt v. Montgomery County.....	94	Md. 115.....	521
Oliver's Estate.....	136	Pa. 43.....	639
Oliver v. Hook.....	47	Md. 301.....	595

Olmstead v. Keyes.....	85	N. Y. 593.....	477
Oppenheimer v. Levi.....	96	Md. 296.....	483
Orrick v. Boehm.....	49	Md. 72.....	661
Orrick v. Fidelity, etc., Co.....	113	Md.....	569
Osborne v. Morgan.....	130	Mass. 102.....	157
Overman v. Hoboken City Bank....	30	N. J. Law, 61.....	184
Paine v. Hall.....	18	Ves. 475.....	255
Pakas v. Hollingshead.....	184	N. Y. 24.....	401
Palmer v. Hughes.....	84	Md. 659.....	240
Palmer v. Rowan.....	21	Neb. 452.....	237
Parker v. Hotchkiss.....	1	Wall. Jr. 269.....	238
Patapsco Co. v. Baltimore City.....	110	Md. 310.....	684
Payne v. Powell.....	5	Bush. 248.....	674
Peabody Heights Co. v. Wilson....	82	Md. 186.....	577, 578
Pennington v. Gittings.....	2	G. & J. 208.....	657, 677
Person v. Grier.....	66	N. Y. 124.....	237
Peters v. Tilghman.....	111	Md. 227.....	462
Peterson v. State.....	83	Md. 194.....	544
Phil. & Balto. R. R. Co. v. Holden..	93	Md. 417.....	314
Phillips v. W. & R. Ry. Co.....	104	Md. 455.....	320, 321
Phinney v. Sheppard & Enoch } Pratt Hospital.....	88	Md. 639.....	495
Pierce v. Burroughs.....	58	N. H. 302.....	673
Pittsburg St. Co. v. Balto. Eq. Soc..	113	Md. 77.....	493, 494
Poole v. Falls Road R. W. Co.....	88	Md. 538.....	228
Pope v. Allis.....	115	U. S. 363.....	399
Pope v. King.....	108	Md. 46.....	402
Porter v. Askew.....	11	G. & J. 346.....	258, 259
Poultney v. Tiffany.....	112	Md. 633.....	584
Hospital.....	88	Md. 627.....	107
Pratt v. Sheppard & Enoch Pratt }			
Price's Case.....	84	Md. 506.....	545, 548
Price v. P., W. & B. R. R. Co.....	84	Md. 512.....	543
Prince De Bearn v. Winans.....	111	Md. 474.....	109
Pringle v. Vesta Coal Co.....	172	Pa. 438.....	501
Pumpelly v. Green Bay Co.....	13	Wallace, 178.....	447
Pumphrey v. Baltimore.....	47	Md. 145.....	51
Queen City Glass Co. v. Clay Pot } Co.....	97	Md. 429.....	177
Quinn v. Safe Deposit Co.....	93	Md. 285.....	634
Quist v. Goodfellow.....	90	Minn. 509.....	430
Rahe v. Shoenberger Coal Co.....	213	Pa. 252.....	507, 513, 514
Rahe v. Shoenberger Coal Co.....	5	A. & E. Am. Cases, 219....	514
R. R. Co. v. Godfrey.....	71	Ill. 500.....	543
R. R. Co. v. Hall.....	91	U. S. 355.....	52

Railroad Co. v. Railroad Co.....	13	Howard, 83.....	447
Raisin v. Clark.....	41	Md. 158.....	426, 427
Raisin v. Conley.....	58	Md. 65.....	178
Ranstead v. Allen.....	85	Md. 486.....	36
Redemptorists v. Wenig.....	79	Md. 348.....	512
Red River Valley Bank v. Craig.....	181	U. S. 558.....	494
Reed v. Head.....	6	Allen. 174.....	639
Reed v. Reed.....	82	Md. 138.....	466
Reeves v. Southern Ry. Co.....		(Ga.) 70 L. R. A. 525....	684
Reg. v. Bishop of Chichester.....	2	El. & El. 209.....	48
Reidel v. P. W. & B. R. R. Co.....	87	Md. 156.....	543
Reynolds v. Manning.....	15	Md. 526.....	554
Rice v. Forsyth.....	41	Md. 389.....	178
Richmond Gas Co. v. Baker.....	146	Ind. 600.....	155
Riggs v. Cragg.....	26	Hun. 89.....	638
Rittler v. Smith.....	70	Md. 261.....	475, 476
Rizer v. Perry.....	58	Md. 112.....	661
Robb v. Carter.....	65	Md. 321.....	92
Robertson v. Youghlougheny River Coal Co.....	172	Pa. 566.....	501
Robey v. State.....		Md. 71.....	116
Robinson v. Hurst.....	78	Md. 59.....	476
Rockwell v. Young.....	60	Md. 563.....	661
Rogers, Brown & Co. v. Nat. Bank..	93	Md. 613.....	610
Roman v. Strauss.....	10	Md. 89.....	439
Rowley et al. v. Bigelow et al.....	12	Pick. 306.....	695
Rumsey v. N. Y. & N. E. R. R.....	133	N. Y. 79.....	228
Sachs v. Minneapolis.....	75	Minn. 30.....	448
Salmon v. Boykin.....	66	Md. 550.....	400
Sappington v. Scott.....	14	Md. 56.....	92
Sascer v. Young.....	6	G. & J. 248.....	195
Savington's Case.....	71	Md. 590.....	7
Scarlett v. Stein.....	40	Md. 525.....	648
Schaeffer v. Gilbert.....	73	Md. 66.....	240
Schindel v. Keedy.....	43	Md. 413.....	203
Schwartz v. Yearly.....	31	Md. 271.....	427
Scott v. Berkshire Bank.....	140	Mass. 157.....	673
Second Nat. Bk. v. Western Nat. Bank.....	51	Md. 138.....	190
Seff v. Brotman.....		Md. 278.....	555
Sellman v. Sellman.....	63	Md. 520.....	579
Serio v. Murphy.....	99	Md. 545.....	534
Shafer v. Wilson.....	44	Md. 281.....	533
Sheedy v. Roach.....	124	Mass. 172.....	667
Sheridan's Case.....	101	Md. 50.....	543
Shipley v. Caples.....	17	Md. 183.....	439
Shipley v. Mercantile Trust Co.....	102	Md. 649.....	251
Shipley v. Ritter.....	7	Md. 408.....	440

Shively v. Baptist Church.....	67	Md. 495.....	669
Shreeve v. Shreeve.....	43	Md. 382.....	251, 252
Siebert v. Lewis.....	122	U. S. 284.....	496
Simpson v. League.....	110	Md. 293.....	466
Skinner & Mounce Co. v. Waite.....	155	Fed. Rep. 828.....	238
Small v. Montgomery.....	23	Fed. Rep. 707.....	238
Smith v. Dana.....	77	Conn. 543.....	641
Smith v. Hooper.....	95	Md. 16.....	633, 641
Smith v. Humphreys.....	104	Md. 289.....	36
Smith v. Swormstedt.....	16	How. 303.....	568
Smith v. Wilson.....	17	Md. 460.....	661
Smoot v. Somerville.....	59	Md. 84.....	90
Souder v. Home Friendly So.....	72	Md. 511.....	476
South Balto. Co. v. Kirby.....	89	Md. 64.....	203
Southern Advertising Co. v. Me- trople Co.....	91	Md. 61.....	119
Southern Ry. Co. v. Grizzle.....		Ga. 735.....	157
Sp. C. G. Co. v. P. S. R. R.....	167	Pa. 6.....	448
Sparrows Pt. R. R. Co. v. Hackett.....	87	Md. 234.....	416
Stallings v. Gottschalk.....	77	Md. 433.....	196
Stanton v. Lapp.....	113	Md. 324.....	438
State, use of Harvey, v. B. & O. R. R. Co.....	69	Md. 346.....	544
State v. Berkeley.....		Mo. 184.....	55
State v. Brown.....	64	Md. 204.....	611
State v. Falkenham.....	73	Md. 463.....	344
State v. Jersey City.....	27	N. J. L. 536.....	89
State v. Megaarden.....	85	Minn. 44.....	88
State v. Northern C. R. R.....	44	Md. 167.....	344
State v. Police Commissioners.....	16	Mo. App. 48.....	88
State, use of Bacon, v. R. R. Co....	58	Md. 482.....	319
State, use Trustees M. E. Church v. Warren.....	28	Md. 338.....	661
State v. Mut. Accident Asso.....		Wis. 624.....	685
State v. Yewell.....	63	Md. 120.....	344
Stearns v. Richmond.....	88	Va. 929.....	533
Stinson v. Ellicott City, etc., Co....	109	Md. 114.....	439, 441
Stumore v. Shaw.....	68	Md. 19.....	527
Stump v. Stump.....	91	Md. 705.....	454
Summers v. Beeler.....	90	Md. 474.....	577, 578
Swift v. Williams.....	68	Md. 236.....	185
Tall v. Steam Packet Co.....	90	Md. 248.....	690
Taylor v. Henry.....	48	Md. 557.....	674
Taylor v. State.....	73	Md. 217.....	195
Taylor v. Taylor.....	47	Md. 299.....	333
Thomas v. Gregg.....	78	Md. 545.....	634, 641
Thompson's Estate.....	153	Pa. 332.....	639
Thompson v. Traction Co.....	181	Pa. 131.....	513

CASES CITED.

xxiii

Thurston v. Minke.....	32	Md. 487.....	577, 578
Tinges v. Moale.....	25	Md. 480.....	430
Tolson's Case.....	139	U. S. 551.....	5
Totten v. Bucy.....	57	Md. 446.....	116, 121
Trayhern v. Colburn.....	66	Md. 278.....	610
Trego v. Skinner.....	42	Md. 426.....	441
Triesler v. Wilson.....	89	Md. 176.....	48, 49
Trinidad Asphalt Co. v. Ambrose...		(1899) A. C. 594.....	502
Trinity M. E. Church v. Baker.....	91	Md. 539.....	656, 661, 670
Trustees v. Hart's Executors.....	4	Wheat. 1.....	667
Trustees Western Md. College v. } McKinstry.....	75	Md. 189.....	602
Tucker and Others, Executors, v. } Seaman's Aid Society.....	7	Met. 188.....	253
Tunncliffe v. W. Leigh Col. Co.....	2	Ch. 22.....	515
Turnpike Road v. Railroad Co.....	81	Md. 256.....	447
Tyson v. Shuey.....	5	Md. 540.....	438, 462
United Rys. & El. Co. v. Ward.....	113	Md. 649.....	168, 321
United Rys. & El. Co. v. Watkins..	102	Md. 267.....	321
United States v. Old Settlers, etc..	148	U. S. 480.....	570
Vanderslice v. Philadelphia.....	103	Pa. 102.....	513
Vinton's Appeal.....	99	Pa. St. 434.....	638
Walker v. Baldwin.....	106	Md. 634.....	433
Walker v. Walker.....	68	N. H. 407.....	638
Wallace v. Adams.....	204	U. S. 425.....	568
Walston v. White.....	5	Md. 297.....	250, 252
Ward v. Schlosser.....	111	Md. 528.....	214, 413
Warfield v. Dorsey.....	39	Md. 299.....	203
Warfield et al. v. Walter et al.....	11	G. & J. 80.....	693
Warner v. Williams.....	93	Md. 521.....	195
Washington Gas Light Co. v. } District of Columbia.....	161	U. S. 316.....	155
Weaver v. Berwind-White Coal Co..	216	Pa. 195.....	502, 508, 513
Webb v. Ridgely.....	38	Md. 369.....	438
Webb v. Webb.....	92	Md. 113.....	586
Webster v. Moore.....	108	Md. 595.....	400
Webster v. Pole Line Co.....	112	Md. 416.....	450
Western Md. R. R. Co. v. State, } use of Kehoe.....	83	Md. 434.....	543, 548, 556
Wetherall v. Clagett.....	28	Md. 465.....	535
Whitechurch v. Whitechurch....	2	P. Wms. 236, Gilb. Rep. in Eq. 168.....	335
Whitehouse v. Bolster.....	95	Maine.....	256
Whiting v. Ins. Co.....	15	Md. 326.....	476
Whitney v. R. R. Co.....	11	Gray, 359.....	578
Whitridge v. Barry.....	42	Md. 150.....	475

Whitridge v. Whitridge.....	76	Md. 73.....	612
Wilhelm v. Hardman.....	13	Md. 140.....	24
Williams v. Fulmer.....	151	Pa. 405.....	513
Williams v. Gibson.....	84	Ala. 228.....	501
Williams v. Hay.....	120	Pa. 485.....	501
Williams v. Huntingdon.....	68	Md. 591.....	116
Willis v. Kern.....	21	La. Ann. 749.....	119
Wilms v. Jess.....	94	Ill. 464.....	501
Wilson v. Donaldson.....	117	Ind. 356.....	237
Wilson v. Herbert.....	76	Md. 498.....	649
Wilson v. Hinsley.....	13	Md. 64.....	438
Wilson v. Pritchett.....	99	Md. 583.....	119, 121
Wilson Machine Co. v. Wilson.....	22	Fed. Rep. 80.....	238
Woman's Foreign Missionary So- ciety v. Mitchell.....	93	Md. 199.....	655, 656, 670
Wood v. Helges.....	83	Md. 208.....	233
Wood v. Macon.....	68	Ga. 539.....	448
Worthington v. Worthington.....	112	Md. 141.....	36
Yandes v. Wright.....	66	Ind. 319.....	501, 503
Yates v. McCullough Iron Co.....	69	Md. 370.....	234
Youghiogheny River Coal Co. v. Allegheny Nat. Bank.....	211	Pa. 319.....	501
Youghiogheny River Coal Co. v. Hopkins.....	198	Pa. 343.....	503
Zimmerman v. Bitner.....	79	Md. 125.....	612
Zimmerman v. Frushour.....	108	Md. 115.....	613

TABLE OF STATUTES.

Code of Public General Laws.

- Art. 5, sec. 40. Dismissal of appeal for failure to transmit record, 301.
- Art. 13, sec. 74, 78. Rights of holders of promissory notes, 116.
- Art. 14, sec. 6. Contents of bill of lading as evidence, 696.
- Art. 14, sec. 9. When bill of lading to be issued, 697.
- Art. 16, sec. 153. Overruling of demurrer to bill in equity, 440.
- Art. 23, sec. 1-92. Relating to corporations, 495.
- Art. 23, sec. 20. Class 5, Cemetery Companies, 446.
- Art. 23, sec. 64a. Stockholders' liability, 491.
- Art. 23, sec. 66. Submission of foreign corporation to laws of this State, 684.
- Art. 23, sec. 133. Opening of streets through cemeteries, 443.
- Art. 23, sec. 137, 141. Relating to foreign corporations, 682.
- Art. 23, sec. 255. Occupation of streets by railroad companies, 224.
- Art. 23, sec. 408. Preferred stock of corporations, 490, 561.
- Art. 23, sec. 409. Process against foreign corporations, 683.
- Art. 23, sec. 415. Name by which corporation to be sued, 658, 672.
- Art. 35, sec. 1. Competency of witnesses, 344.
- Art. 35, sec. 3. Competency of witnesses in case of death, &c., 35.
- Art. 44, sec. 12, 13, 14. Hearings by Governor of complaints against civil officers, 84.
- Art. 46, sec. 6, 14. Descents, 257.
- Art. 46, sec. 21. Descent of lands acquired by purchase, 257.
- Art. 46, sec. 27. Children to take by representation, 258.
- Art. 75, sec. 117. Judgments in replevin, 700.
- Art. 81, sec. 2. Assessment of property for taxation, 685.
- Art. 81, sec. 214, 224. Taxes on distilled spirits, 680.
- Art. 93, sec. 129. Order of distribution, 258.
- Art. 93, sec. 314-329. Relating to wills, 340.
- Art. 93, sec. 316. Requisites of a competent testator, 332.
- Art. 93, sec. 317. Requisites of a valid will, 340, 602.
- Art. 93, sec. 322. Devise to charitable uses, 661.
- Art. 93, sec. 329. What passes under will, 339.

Code of Public Local Laws.

- Art. 4, sec. 99-101. Relating to School Commissioners of Baltimore City, 266.
- Art. 4, sec. 740, 741. Police Commissioners of Baltimore City, 79.
- Art. 4, sec. 745, 749. Duties of Police Commissioners of Baltimore City, 81.

City Code.

Art. 30, sec. 14. Locomotives in streets, 543.

Acts of Assembly.

- 1798, ch. 101. Relating to wills, 332.
1820, ch. 191. Relating to descents, 258.
1826, ch. 123. Charter of B. & O. R. R., 445.
1864, ch. 100. Evidence Act, 340.
1868, ch. 471. Relating to corporations, 563.
1880, ch. 474. Relating to corporations, 563.
1884, ch. 293. Relating to wills, 603.
1888, ch. 249. Devises to charitable uses, 661.
1900, ch. 15. Appointment of Police Commissioners by Governor, 78.
1900, ch. 207. Relating to leases, 333.
1904, ch. 337. Enforcement of stockholders' liability, 494.
1904, ch. 349. Construction of sewers in Baltimore City, 521.
1908, ch. 240. Relating to corporations, 491, 563, 684.
1908, ch. 305. Relating to stockholders' liability, 490, &c.
1908, ch. 428. Relating to Orphans' Courts, 454.
1908, ch. 583. Dedication of streets in Baltimore City, 591.
1910, ch. 306. Charter of Cumberland, 41.

Constitution of Maryland.

- Art. 2, sec. 1. Executive department, 90.
Art. 2, sec. 9. Duties of Governor, 90.
Art. 3, sec. 11. Filling of vacancies by Governor, 91.
Art. 2, sec. 13. Appointment of civil officers by Governor, 92.
Art. 2, sec. 15. Removal of civil officers by Governor, 79.
Art. 15. Declaration of Rights—Levying of taxes, 680.
Art. 38. Declaration of Rights—Gifts for religious purposes, 662, 666.

Constitution of United States.

- Art. 1, sec. 10. Impairing obligation of contract, 496.

IN MEMORIAM.

COURT OF APPEALS,

ANNAPOLIS, April 5th, 1911.

During the session of the Court today the following proceedings were had:

ATTORNEY-GENERAL STRAUS said:

With the Permission of your Honors:

I have the sad office of formally announcing to the Court that on Sunday, the 5th of February, 1911, at his home in Baltimore City, the Honorable DAVID FOWLER, for fifteen years a member of this Honorable Court, departed this life; and that on the 3rd of March, 1911, in Baltimore City, the Honorable SAMUEL D. SCHMUCKER, a member of this Court from 1898 to that date, also died.

The decease of these two eminent Jurists and high Magistrates is mourned deeply and universally by the Bench, the Bar and the people of the State of Maryland.

Those who knew them personally are bowed down with an ineffable sorrow and grief at their demise. To the science of the Law, the interests of Justice and the service of the State, the loss is grievous and enduring.

Judge Fowler was a native of Maryland. He was born in Washington County in 1836. He was educated at St. James' College, where he graduated in 1858. He then entered the distinguished law office of Brown and Brune, in the City of Baltimore, where he pursued his legal studies and was admitted to the Bar in 1862. In his early professional years he was thrown into close professional relations with the late Reverdy Johnson, and also and subsequently with the late Charles J. M. Gwinn. At the Bar he was distinguished for learning, ability, rectitude and fidelity to his professional duties.

In 1882, he was elected to the Bench as an Associate Judge of the Third Judicial Circuit, including Baltimore and Harford Counties. Upon the retirement of Chief Judge Yellott of that Circuit in 1889, Judge Fowler was appointed by Governor Jackson to the Chief Judgeship of the Circuit and to Membership in this Court. The following year, 1890, he was

elected by the people of his Circuit as Chief Judge thereof and as a Judge of this Court for the constitutional term of fifteen years. He would have reached the age limit of seventy years in 1906, and therefore, at the expiration of his term in 1905, he was not a candidate for re-election. Upon his retirement from the Bench, however, his intellectual and professional activities did not cease. He resumed, with his accustomed energy, earnestness and zeal, the practice of his profession and pursued it with distinguished ability and signal success virtually to the time of his decease.

Judge Schmucker was born in the year 1844, in our sister State, Pennsylvania, at the now historic town of Gettysburg. He was graduated from Pennsylvania College in 1863, at the age of 19, and entered the Union Army. After a brief military experience, he took up the study of the law at the University of New York. He graduated there in 1865, and in 1866 began the practice of his profession in the City of Baltimore. His career at the Bar was highly useful and successful. He was acknowledged to be one of the very leading commercial lawyers of this State and as such was frequently called upon professionally to manage large and intricate business and corporate interests. He was universally esteemed by the profession and for several years was President of the Bar Association of Baltimore. He was noted and loved, also, for his charitable works. "The ocean of his philanthropy knew no shore." He was President of the Board of Trustees of the Baltimore Orphan Asylum, a Trustee of the Home for Aged Men and Women, of the Henry Watson Children's Aid Society, the Society for Protection of Children, the House of Reformation, Maryland Bible Society, Maryland Tract Society and the Maryland Sunday-School Union. He served as a member of the Commission that prepared the New Charter for Baltimore City, as a member of the Court House Commission, and on the Committee appointed to draft the Negotiable Instrument Law which was adopted by the Legislature during the session of 1896. Governor Lowndes appointed Judge Schmucker to the Bench in 1898 to succeed the late Judge William Shepard Bryan, and he was elected for the full term of fifteen years in 1899.

Judge Fowler and Judge Schmucker were learned, able, just and upright judges. They were men of great intellectual vigor, deeply read in the learning of the law, masters of its rea-

son and philosophy, and imbued with the finest and loftiest sense of the obligations and responsibilities of the judicial office. Their numerous opinions, wherein they delivered the judgments of this high and august Court, enriched with profound and varied erudition, and illumined with the clear rays of that pure reason which is the life of the law, have strengthened, developed and illustrated the jurisprudence of Maryland. They expounded, applied and upheld the law without fear, favor or affection, finding its sources in eternal justice—its voice, as Hooker of old said, “in the harmony of the Universe and its seat in the bosom of God.”

They were lawyers who would have adorned any Bar, Judges who would have graced any Bench, citizens who would have ennobled any State, and gentlemen who exemplified the cardinal virtues and best qualities of manhood and character.

During their service upon the Bench, as well as throughout the period of their practice at the Bar, they were unfailingly courteous to and considerate of all the members of the profession and were in return generally esteemed and loved by them.

In their death the State of Maryland has suffered a deep bereavement and an egregious and lasting loss, which shall long be mourned by the people.

The members of this Court appreciate far better than it is possible for anyone to describe the graces and gifts of heart and mind, the beautiful attributes of character, the winsomeness and magnetism, the true, priceless personal worth of each of these deceased Jurists, your Honors’ late, lamented brethren, and in respect to the memory of each of them, on behalf of the Bar and of the people of this State, I respectfully move that your Honors will direct that appropriate minutes of these proceedings be entered upon the Records of this Court and that such further action be taken as your Honors may deem fitting.

BERNARD CARTER, Esq., said:

I esteem it a great privilege to be present today in this Court, and to be allowed to take some part in its proceedings commemorative of the Honorable David Fowler and Samuel D. Schmucker, lately members of the Court

My memory of Judge Fowler goes back to his admission to the Bar of Maryland in the year 1861, and I therefore knew him at the time he became one of the Judges of the Circuit

Courts for Baltimore and Harford Counties in the year 1882, and at the time of his subsequent elevation to the Bench of this Court in the year 1889.

As I did not have the privilege of becoming acquainted with Judge Schmucker until much later, and as others of my brethren will speak today of him, it has seemed more appropriate that I should speak of Judge Fowler.

Although his seven years' service in the judicial office on the circuit was an excellent preparation for the more important and difficult duties which awaited him upon his becoming a member of this Court, yet everyone who reads his opinions, as they are contained in the Maryland Reports, at the beginning of his judicial career on this Bench, and at later periods of that career, and compares his qualifications for the position, at these respective periods, realizes what great growth gradually took place in his intellectual breadth and strength and other judicial qualifications for efficient participation by him in the proper disposition of the important cases which came before this Court while he was a member of it.

From the time he took his seat upon this Bench, until he left it, he conscientiously applied his mind, day by day, to make himself thoroughly familiar with the many subjects which it was necessary he should understand, in order to properly dispose of the many important questions which, from time to time, came before the Court for determination; he thus not only acquired increased knowledge, but he greatly strengthened and developed his naturally vigorous mind; so that, before the time of his mid-judicial service on this Bench, he was able to bring to the performance of his judicial duties, a well-balanced judgment, vigorous, well-trained faculties, strengthened by constant study, and a memory enriched by the knowledge of jurisprudence, and polite literature. He had so become an able and learned member of this Court, the duties of which he discharged with firmness of conviction, soundness of heart and mind, thorough integrity and impartiality, and a high ideal of duty.

He was a man of great courage, moral, physical and intellectual, and stood ever for what he deemed the right.

It is a great joy to the members of Judge Fowler's family, and to those to whom his name and fame are personally dear, to know that his learning and ability earned for him the honor, and his uprightness and high character won for him the esteem

and affection, of the members of this Court with whom he was so long associated in their arduous labors, and of the members of the Bar of Maryland.

At the time of his death Judge Fowler was, and for many years before had been, a communicant of the Protestant Episcopal Church, and manifested an ever increasing trust and faith in the loving kindness of his Heavenly Father.

EDGAR H. GANS, Esq., said:

Samuel D. Schmucker was born to be a Judge. He practiced his profession, before being elevated to the Bench, for more than thirty years, and during all that time his judicial aptitude was forcing itself, little by little, upon his clients and upon the Bench and Bar. The atmosphere of religious ideals came to him as an inheritance, as did his equable temperament and strong sense of right and duty. He had little imagination; and lacked both the fervor of the orator and the bias of the partisan.

He practiced successfully before the Courts; but his personality was too well balanced to win him special eminence as an advocate. He was, by nature, inclined to take the middle path between extremes. Moderation was his guiding principle.

Mentally, he was cautious, shrewd and gifted with great practical sagacity. He had traveled much, both in this country and in Europe, and the experience thereby gained had broadened and enriched his mind.

Morally, he was probity personified. These mental and moral attributes showed themselves in his mien and bearing. He was not only wise, but he looked wise. He was transparently honest and upright. Anyone would safely trust him at sight. These qualities soon brought him a clientele that made his professional life lucrative and successful in every way. He was sought by clients who wanted a safe, prudent, careful counsellor. When an estate was to be administered, a trustee or executor appointed, men naturally turned to Schmucker. They knew that he was learned, capable and trustworthy. We find among his clients the thrifty German and the methodical Quaker. He was always weighing, balancing, judging. When a bank needed a director it would go to Schmucker. When a court house was to be erected or a city charter evolved, the community, by common consent, thought that he was just the man to conserve the

public interests. Thus he came in contact with large affairs, and gained a rather uncommon experience. During all this time he was becoming more than usually expert in commercial and corporate law.

That such a man should be a Judge must, in any reasonable community, depend solely upon his own personal choice. If he wished to round out his professional career upon the Bench, any community should be only too glad to avail itself of his services.

I believe that Judge Schmucker had not only an unusual faculty of knowing others, but that he had an equally just estimate of himself, of his own powers, likings and limitations. He knew that he was at home in the quiet serenity of comparison, analysis and judgment, rather than in the tumult of strenuous advocacy. I believe that he secretly yearned for the calm atmosphere of judicial contemplation, where he could adjudicate the claims of rival contestants without feeling the stress of their partisanship. In all these matters he was, naturally, a no-party man, and it is one of the felicities of his career that his non-partisan, legal soul should be mated with an insistent popular demand for a non-partisan judiciary.

His character had so impressed itself upon the citizens of Baltimore in 1883, that he was nominated for the position of Judge of this Court by the Republican convention; and although he had as antagonist such an able lawyer as William Shepard Bryan (the elder), the Citizens' Committee, presided over by S. Teackle Wallis, would not take sides between candidates so worthy. When the Legislature of 1896 provided for an additional Judge for Baltimore City, Schmucker was the first man mentioned by the press, and when Judge Bryan's term expired in 1898 he was appointed as a matter of course by Governor Lowndes to fill the vacancy.

He took his place on the Bench on November 15th, 1898, and the recognition of his capacity and fitness was so universal, that in May, 1899, a spontaneous movement was made by the Bar of Baltimore, irrespective of party, to retain the services of a man who was so eminently qualified for the Bench, and who had consented to take a judicial position at so great a pecuniary sacrifice.

The press of the city was unanimous. It was not so much a question of honoring him as of accepting a service which the

community, judging by ordinary standards, had no right to expect. He had been on the Bench only six months, but the flower of the Bar of Baltimore demanded his election. He was a Republican in politics. The City of Baltimore was normally Democratic. As elections generally went, he would have but little chance of success. But the Bar and a united press insisted. The people wanted the best Judge they could get irrespective of politics. Here was a man not only eminently qualified for the high place, but willing to serve the public, though he would not stir a finger to secure the position. Party spirit showed itself in opposition. Why should a Republican be elected Judge in a Democratic city? was the cry. To this political appeal the Bar of Baltimore, to its infinite credit, made this answer:

"We, the undersigned, members of the Bar of Baltimore City, irrespective of party, desire to express our appreciation of the signal judicial ability displayed by the Honorable Samuel D. Schmucker since his appointment to a seat on the Bench of the Court of Appeals of Maryland. We also respectfully suggest that he should be retained on the Bench by the nomination of all political parties, so that the City and State may continue to have, in the highest tribunal of the State, the advantage of the services of a Judge who has shown himself so eminently qualified for this elevated position."

Among the signers of this petition were such leaders of the bar as William Pinkney Whyte, Bernard Carter, Arthur W. Machen, Charles Marshall, William A. Fisher, Arthur George Brown, John K. Cowen, John P. Poe, Richard M. Venable and Randolph Barton. These men were Democrats. Judge Schmucker was a Republican. It was a splendid tribute from strong, earnest men, and furnished a striking lesson to the people of Baltimore on the essential non-partisanship of the judiciary.

Since he has been on the Bench his record is an open book. He has more than fulfilled the anticipations of his friends and admirers. Your Honors know how dependable he was; with what patience, courtesy and level-headedness he listened to arguments and helped the Court in conferences. He made no pretense at style, but his opinions were always direct, clear and practical.

I would fain say a word as to his personal character as a man and a friend. I was honored by having his confidence, and in being admitted to the circle of his intimate friends. I talked with him but a few days before his death. His chief concern was that his sickness was keeping him from his judicial duties.

I marveled at his optimism, his heroic endurance of pain, and the calmness with which he confronted fatal possibilities. I would that I could talk to you of his interior life, the life made up of the soul's self-communing; but in this presence, and on this occasion, I can but portray the qualities which made him a worthy representative of Baltimore in this high tribunal. Bartol, Bryan, Schmucker. These have been the judicial representatives from Baltimore in the Court of Appeals. The standard is high, but if we read the signs of the times aright, if now, as in the past, the best men are to be chosen irrespective of politics, they will have worthy successors.

D. G. McINTOSH, Esq., said:

In addressing this Court, to memorialize the life and death of Judge Fowler, I wish in common with my brethren of the Bar to express my high appreciation of the long and distinguished services rendered by the deceased as a member of the Judiciary of this State. I wish at the same time to speak of him as a man, and to say something of my love and admiration for him as a friend. I esteem it a great privilege in this presence, and in this chamber where he was so long engaged in congenial tasks, and surrounded with pleasant associations, to be able to offer upon the shrine of friendship, as a libation to his memory, some small expression of my affectionate regard.

I lament his death as a personal loss; while his health had for some time been frail, the end came unexpectedly. At the very moment when inquiring friends were asking after his health, unknown to both, his spirit was taking its flight. It "fluttered, and failed of breath":—the mailed hand of death is always cruel, but when the stroke comes without warning, it adds poignancy to the grief of those whom it robs and leaves behind.

My acquaintance with Judge Fowler began in the summer of 1882, during the canvass for the office of Associate Judge of the Third Judicial Circuit. We then became friends, and our

friendship grew closer, and was steadily maintained to the hour of his death. I look back upon our long and intimate intercourse with pleasure, not unmixed with pride.

There was in Judge Fowler a certain nobility of soul, a purity of life, an aiming after high ideals, and a superiority to all that is petty and mean, which made his companionship elevating and ennobling.

Nature endowed him with a genial and generous temperament, which gave sweetness to his life, and inspired the love of his family and friends. Accustomed as he was to a large intercourse with men, and perfectly at ease in their presence, he preferred always domestic quiet and the companionship of friends. His habits were quiet and unobtrusive, his tastes plain and simple, his desires moderate, and his manner of living frugal. He was always affable and courteous. His courtesy was not born of mannerism, but it was the courtesy of true politeness flowing from the kindness of his heart, and springing from a delicate consideration for the feelings and sensibilities of others.

The sincerity and openness of his nature and the kindness of his disposition impressed all who knew him, and the cordiality and amenity of his manners added a personal charm which made him a welcome guest in every social circle.

Judge Fowler was a good citizen and a kind neighbor. He had a high conception of civic duty, and his influence was always exerted in the direction of those forces which make for the good of society and the uplift of humanity.

He was honest in all the relations of life, in word and in act, and above all in those mental processes which are the mainspring of action and form the basis of character.

While he was firm in his beliefs and decided in his convictions, he was tolerant of opposition and liberal towards those who differed from him in opinion. He was averse to controversy, and never aggressive in seeking to impose his views on others, but he held with great tenacity to opinions maturely formed, and it was this quality which lent strength and force to his character.

When Judge Fowler ascended the Bench, he was without that large experience at the trial table enjoyed by some lawyers, and which is sometimes supposed to be a necessary qualification for the duties of that position. But he had been reared as a stu-

dent and was well versed in legal principles, and his training had been under the guidance of the most illustrious leader of the Bar. He brought to the discharge of his new duties alacrity and zeal, and a firm determination to discharge those duties with all the fidelity to truth and justice of which he was capable. He was possessed of a vigorous understanding, and to a cultivated mind he added a discriminating judgment, which rarely erred in making up its conclusions. To the Bar he was uniformly courteous, and he insisted upon proper consideration being shown to all who had business in his Court. His perceptions were acute, and always on the alert where moral issues were involved. No personal considerations disturbed the poise of his judgment. He was unmoved alike by the mere display of learning, or prestige of intellect, on the part of members of the Bar, and no influence from any quarter could move him a hair's breadth from what he believed to be right. His distinguishing characteristic was a desire to be fair, and so manifest was this disposition in the trial of a cause that even the party who failed to win was compelled to feel that he had had a fair chance.

In every community, the influence which silently radiates from the Bench is a potent force for good or evil. It is felt by contagion as well as by example. In this respect, the high character and moral integrity of Judge Fowler exercised a happy and wholesome influence throughout the whole community in which he lived.

He was appointed Chief Judge of the Circuit to succeed Judge Yellott on August 1, 1889, and was elected by the people to that office in the following November. He served as Chief Judge continuously, from the day of his appointment until he resigned on the 8th of October, 1905.

Of his services on this Bench and his associations with the members of this Court, I shall not speak at length, because they have already been referred to, in terms which leave nothing further for me to say, and because they are best known to your Honors. While his health was not robust, he never shrank from the full performance of the work allotted him. I believe he enjoyed the dignity and repose of this Court, and even its laborious and exacting duties, as a happy relief from the excited and heated clashes which so often prevail at *nisi prius*.

His lasting memorial will be found scattered through thirty volumes of the Reports of this Court. His opinions abound with learning, and show careful study and research. They are distinguished for their clearness of style, and felicity of expression.

Judge Fowler's record, as a citizen, as a Judge, as a neighbor and a friend, is one of which any man may feel proud. All men like to be thought well of when they come to die:—after all, it is not so much what a man achieves in this life, as how much of the respect and the affection of his fellow-man he has earned and carries with him. In this respect our friend was singularly fortunate. He left no enemies, and he carried with him the respect and esteem of all who knew him. But when we reflect upon his end, we are reminded that the words of the Psalmist are as true today as they were more than two thousand years ago,

“All flesh is as grass,
And the glory of man as the flower of grass,
The grass withereth, the flower thereof falleth away.”

He has gone, we believe, to reap the reward which belongs to the just who walk in the love and fear of God, and in the high service of humanity; and we do not doubt that when his spirit took its flight through the realms of a boundless eternity, he felt, in the assurance of an earnest Christian faith,

“That though from out our bourne of time and place,
The flood may bear me far,
I hope to meet my pilot face to face
When I have crossed the bar.”

RANDOLPH BARTON, Esq., said:

It is, perhaps, not going too far to say that more than ever in the history and progress of this nation must we look to the judiciary, Federal and State, for the preservation of individual rights. Legislative bodies may from day to day enact laws and executives may from time to time devote themselves to their execution; but, as was always intended, and as now more than ever it is essential, the people must place their final trust in the wisdom, the courage, and, above all things, in the honesty of their judges.

No observant man can fail to perceive that year by year the complexities, the refinements and the difficulties of civilization

increase. Before the Supreme Court of the Nation there is in our time no moment when some question of greatest magnitude as it affects the national welfare of great bodies of the people is not pending.

Something more than an accurate knowledge of law as it has been declared seems to be required. Something more than knowledge of the law books seems to be necessary to meet and solve the problems which are incessantly presenting themselves, and it seems as if the people expect from that great tribunal a species of infallibility, a quality of wisdom that cannot go wrong, and a purity of purpose that is unblemished.

In a degree smaller only in a material sense are the same attributes looked for in the Supreme Courts of the various States. It is just as essential to a population of one million people as it is to a population of ninety millions that honesty of purpose first, and then justice and wisdom, should govern their highest judicial tribunals. Without this security all the blessings of peace and order, all the rewards of industry, perseverance and good citizenship, will crumble and anarchy will take their place.

To all of us here, bred to the law and keenly alive to the truth of what I have said, it is only needed to make these observations to at once arouse the mind to the grave importance of the duties and powers resting in the appellate tribunals. No member of our highest courts can reflect upon these matters without shuddering at the heavy responsibility weighing upon him. To feel that life sometimes, the liberty sometimes, and the property always, of other men, is subject to the determination of all, or possibly of some one member, must give to the life of the man who is called to the Bench a seriousness of character and habit, which inevitably separates him from the lighter and perhaps more enjoyable pursuits of life, and sets him apart and dedicates him to the highest duties to his fellow-men.

It happens that today we are here to render our tributes of respect to two men who have had all the weight, and care, and responsibilities of judicial duties. They have sat upon this Bench and have borne the keen anxieties that must bear down upon men of any sensibilities. They have passed from hence into the great unknown world. They are beyond the reach of our plaudits or our censure. They have played their part upon the stage of human existence, and we are here only to tell them,

if in some mysterious and unknown way we can tell them, that they are not forgotten.

No one can look upon the chair of Judge Schmucker, so recently vacated, without a feeling of distress that never more will we see him in his accustomed place. I am sure that the members of this high Court remember well the sensation of comfort they felt when they were at the bar, in looking upon the assembled Judges they realized that no matter what might be the determination of the Court, at least they were secure in obtaining an able and honest decision.

I am sure that every member of the Bar who saw Judge Schmucker before him when his case was called felt that no matter what his own effort might be, whether strong or feeble, he would get from him an attentive hearing, and that in the deliberation of the Judges he would contribute to their views honest and impartial thoughts; that he would be behind no one in giving to his client his full and exact rights, as nearly as human judgment can be full and exact.

One would almost fear, when he reflects how fleeting are earthly distinctions, that a Judge upon the Bench would lose somewhat of the stimulus of ambition, and, comparatively, secure in his term of office and in its moderate emoluments, would fall into a merely perfunctory discharge of its duties. Unless I am greatly mistaken, if Judge Schmucker was ever tempted in that way, he drove the tempter from his presence. My acquaintance with him at the bar always brings before me the industrious lawyer, painstaking and very faithful to his clients; our intimacy was not very close, but I am sure that at times our interest clashed, and yet, after an effort of memory, I can recall no incident in our association that has left any trace of a disagreeable impression. After he went upon the Bench it happened that I saw him occasionally in social gatherings, and I became conscious of an ever-increasing pleasure when I found that he was of the company I was to join.

All of us can count upon the fingers the judges of this country and England who reached a long and lasting pre-eminence. Astonishing ability, seconded by extraordinary opportunities, gave to us a Marshall, whose fame shines with undiminished lustre, and when we recall him, and Taney, and Story, and Curtis, we almost feel that we have exhausted the first rank of great judicial ability.

But behind them must be remembered the mass of men who as judges have lived and done signal service to their fellow-men; who have given their lives, or some of the best years of their lives, to keeping in the right paths the body politic and to whose memory the voices of a happy people should ever rise in praise.

To that class I would assign Judge Schmucker, and in that class I know he would have felt that he had reached a high earthly honor. Just as the firmanent is less beautiful when through the haze which obscures the lesser lights the glare of the few stars of first magnitude penetrates, so it is that we must look beyond the judges who have attained unusual brilliancy, and recall the mass of our judiciary, if we wish to see the real bedrock of our salvation. It is to that great class that the nation is so much indebted. It is to the men who adorn the benches of the Courts of the various States, frequently scarcely known beyond the confines of their States, that we must look to see that order, justice, right and honor are preserved and handed down to succeeding generations as pure and unimpaired as when committed to their charge.

Judge Schmucker in his own way helped to keep pure the temple of justice. He helped to promote social security; he filled his place in this honored Court and left no stain upon its whiteness, and it is thus and in this light that all who knew him will cherish his memory.

GEORGE WHITELOCK, Esq., said:

The record of your late colleagues for judicial efficiency is the common knowledge of the State. Covering in the aggregate a tenure of office of thirty-five years, Judge Fowler and Judge Schmucker were joint participants from 1898 to 1905 in the deliberations of this Court. Judge Fowler wrote 274 of its published opinions; Judge Schmucker was the author of 264. My association with both was long and intimate. Mr. Schmucker was my preceptor, and the partnership which we later formed had lasted twenty-three years when he was appointed to this Bench. Judge Fowler had been a Judge for twenty-three years before his retirement to join me in the practice of the law. Out of such relationships the murmuring surge of memory brings back a host of recollections.

Samuel D. Schmucker came of a long line of students. His mind was scholarly, reflective and analytical; his nature essentially conservative. As a practitioner he spared himself no pains of research or preparation; his work had always completeness and he was content with nothing short of perfect accuracy, both in himself and in those associated with him. To be "neighbor to his counsels" was mental discipline and education alike. Not emotional or aggressively controversial, he preferred the less stirring contest of the chancery or appellate Court to the strife before the jury. He was an accomplished equity pleader, but in every forum acquitted himself with credit and success. Possessing a thoroughly scientific knowledge of the law, his briefs and arguments were admirable for their examples of precision and order. His wide, practical knowledge in banking and commercial law, which proved so helpful later to his colleagues of this Court, was exemplified at the Bar in the Slagle special co-partnership cases; in *Howard Bank v. McShane*, and in the whole series of litigations growing out of the Nicholson Bank failure in Baltimore. Mastering the facts of a case with discerning scrutiny, he applied the legal principles to them with great cogency and fine discrimination. He was a profound and lucid thinker, and his conclusions, whether of law or fact, were always the result of close and exact reasoning. Mr. Schmucker was the safest of advisers, and as I recall our daily association in its long perspective, I can remember no client who consulted him without feeling wiser by his sane advice, nor any who failed to realize the high distinction of his personal character.

Mr. Schmucker was temperamentally judicial. He might be characterized as a judge by nature; if Destiny was ever logical, it was in according him a place on this Bench. Here his highest usefulness was attained and his faculties found their best, because their most natural, expression.

Judge Schmucker's published opinions are exceptionally admirable in diction. Possessing a literary style not ornate but restrained and judicial, the construction is never elliptical or obscure and the opinions themselves, inclusive of those delivered but one month before his death, are models of form and order. The facts are set forth in each instance with rare power of analysis and with such simplicity of statement that all who read may apprehend them. Pertinent decisions are never

ignored or evaded, but frankly faced, antecedent doctrine being reformulated and the precedents distinguished or applied with careful exactitude. The conclusion is reached by a logic hard to refute.

The opinions which Judge Schmucker wrote in *Buchanan v. Lloyd*, in 1898; *State of Maryland v. Northern Central Railway*, in 1900; *Brick Co. v. Amos*, in 1902; *Dry Dock Co. v. Baltimore*, in 1903, and *Home Insurance Company v. Schiff*, in 1906, are demonstrations of his rare endowment as a magistrate. And in his notable judgments in the subsequent cases of *Kingan Packing Co. v. Lloyd*, and *Prince de Bearn v. Winans*, he rose, perhaps, to yet higher altitudes; dealing in the first with the constitutionality of an Act for the redemption of ground rents, and in the second with the construction of a deed of trust for the benefit of a daughter on the eve of her marriage and with a will executed by her in her husband's favor.

Judge Schmucker clarified the law when he declared it. The death of such a jurist (before the expiration of his term of office or attainment of the age limit) is a profound loss, not only to your Honors and the profession, but to the whole Commonwealth.

David Fowler was a lovable altruist. Mr. Reverdy Johnson proclaimed this fact in Mr. Fowler's youth by the bequest to him of certain mementoes for the great kindness which the young man had shown that great constitutional lawyer after the impairment of the latter's eyesight. The same idealism was markedly conspicuous during Judge Fowler's seven years as an Associate Judge in the Circuit Court. Who can forget the kindly courtesy, the self-sacrificing spirit, the industry and the firmness to do the right as God gave him to see it, maintained by him in that arduous period! And those qualities he brought with him to the broader field of his work in this tribunal.

My own acquaintance with Mr. Fowler at the Bar before he became a Judge was brief and casual, but I know that his training as a lawyer had been careful and thorough. None can gainsay his steady growth from the moment of his first appointment to the Circuit Court until his final retirement from the Court of Appeals. His perception of justice was keen and intuitive. Fundamental rights like those of life and personal liberty appealed to him strongly; he wrote of criminal law

and procedure with interest and insight. His eloquent opinion in the equity case of *Scanlon v. Walshe*, refusing to permit a mother and wife to testify to the illegitimacy of her own children born during wedlock and cohabitation with her husband, is a fine example of juristic literature and a signal illustration of his conception of enlightened public policy and determination to enforce the rule of private morality.

An easy felicity of expression pervades his published opinions; their scope and efficiency expanded as he himself developed under experience; and his remarkable intellectual growth was the subject of frequent comment by the profession. Illustrations of his judicial ability are found in his late judgments in the will case of *Kennedy v. Dickey*, and in the corporation case of *Brown v. Maryland Telephone Co.* Thirty volumes of your Reports contain his disquisitions on legal topics. He thought himself, and possibly with reason, that the opinion in *Fisher v. Parr*, on the responsibility of directors for negligence in conducting a corporation, was the best of his judicial handiwork. But the treatment of the law of wills in the *Abell* and *Stickney* cases, and that of receivers of bodies corporate and voluntary relief associations in *Cannon's case* and *Mason v. Equitable League* are of high rank, while his discussion of laches in *Abell v. Firemen's Insurance Co.* is not of lesser dignity.

Judge Fowler's social qualities were of unusual attractiveness. His appeal to the heart was inevitably convincing; and he was requited by a wealth of affection. He loved the amenities, not because he aimed at formalism, but because of his delicate appreciation of the feelings of others. His humor was unfailing; his imagination was delightful; his optimism was invincible; his cordial sympathy put all men at ease, and he seemed never to be striving in his own behalf, but in efforts to benefit others. *Non sibi sed toti.* It was his happy fortune to leave this Court universally beloved and honored, and to receive on his first return to its Bar, when he argued the case of *Lindsay v. Wilson*, a welcome from his former associates, both enthusiastic and tender.

The Judges whom we commemorate today were alike modest, assiduous, high-minded and exemplary in their personal rela-

tions. Each loved justice; both administered it practically, and without sophistry. They were fast friends of each other, although diverse in disposition and mental equipment. Each served the State in his several way; both served her loyally and well.

Cicero declared Wisdom and Friendship to be supreme gifts of the immortal gods to man. (*Est autem amicitia nihil aliud nisi omnium divinarum humanarumque rerum cum benivolentia et caritate summa consensus: qua quidem haud scio an, excepta sapientia, nihil quidquam melius homini sit a diis immortalibus datum.*) Both of these men were wise, both were friendly. But the supreme gift to Judge Schmucker was wisdom—the supreme gift to Judge Fowler was friendship.

CHIEF JUDGE BOYD, said, on behalf of the Court:

It is gratifying to us to hear representatives of the Bar speak so kindly and favorably of those who had been for years members of this Court, and especially when, as on this occasion, we can heartily approve and concur in what has been so truly and well said by those who have addressed us.

I am forcibly reminded of the many changes which time works, when I recall the fact that eight of the Judges with whom I have sat in this Court have reached that which is known to be to all mortals "a necessary end". This afternoon we have laid aside our customary duties to pay fitting tributes to the memories of two of that number who were close friends in life and were not long separated by death. On February 7th this Court adjourned in order that its members and others might attend the funeral of Judge Fowler, and on March 3rd, a few hours after the sittings of the January Term were concluded, the term of office of Judge Schmucker ended by a limitation which man cannot control. Although it is a mournful truth that we cannot meet them again in the flesh, in spirit we will often be with them, for each of them contributed to the jurisprudence of this State much that must guide us in our search for principles and doctrines which must determine the rights of suitors submitted to us.

No one could be associated with Judge Fowler, as we are here with each other, without becoming devotedly attached to him. He had a peculiarly attractive personality. There was something in him which went out to others and drew them to

him—he was what we call magnetic. He was a true and loyal friend, an agreeable companion, an accomplished gentleman, and was kind, considerate and sympathetic. His heart was easily touched by the sorrows and misfortunes of others, but he was of a cheerful disposition and could see bright spots in dark clouds. He was a man of unblemished character and had many virtues which will be long remembered by those who knew him.

The opinions delivered by him in this Court are to be found in thirty volumes—beginning with 72nd Maryland. He rendered the decisions in some of the most important cases reported in those volumes. He had the faculty of stating his views concisely and clearly. He had excellent judgment and was endowed with an unusual amount of that which is so essential to the making of a successful Judge—common sense. For if a law has not as its basis common sense, we can rest assured there is something wrong with it, and if a Judge is lacking in that quality he is more apt to misapply the law than to make proper use of it.

As shown by the opinions delivered by him, Judge Fowler's great object was to do full justice to all concerned, and in some of them there will be noticed an apparent struggle against technicalities which offered resistance to the accomplishment of that end. He was impartial, but was ever watchful of the rights of the weak when threatened by the attacks of the strong. He was an able, industrious and just Judge and, as such, he had the esteem of the Bench and Bar of this State.

Judge Schmucker was exceptionally well equipped for the Bench when he was appointed, in 1898, by Governor Lowndes. His experience at the bar had been large and diversified. His familiarity with commercial transactions and business matters made him of special value and of great assistance to his fellow-Judges in consultation, and enabled him to readily grasp intricate questions involved in cases before them. He possessed in a large measure the ability to make his own thoughts clear to others—a power which is so helpful at the bar and important on the bench. He was of a judicial temperament—was not one-sided, but realized that there are generally two sides to questions in litigation, and, having a well-balanced mind, he could weigh them accurately and impartially. In my judgment, he

was one of the most useful members this Court has had since I have been acquainted with it.

By those who only knew him slightly he was probably thought to be reserved and even distant, but a kinder heart never beat in the breast of man. He was in easy and comfortable circumstances and able to supply all reasonable wants of his own, but the condition of the worthy poor and unfortunate always appealed to him. He was ever ready to do his part in relieving the suffering, comforting the sorrowful, and in any charitable work. He was a man of high sense of honor and the Golden Rule was his guide in his dealings with his fellows.

I could say much more about these two men, with each of whom I was associated in this Court for about twelve years, both as to their private lives and characters and as to the faithful discharge of their public duties, but I forbear because I believe it would be in accord with their wishes, could they speak, that I refrain from such laudatory terms, in speaking of them, as the feelings of my associates and myself might lead me to utter.

We who are especially interested in the standing of this Court recognize that we owe David Fowler and Samuel D. Schmucker debts of gratitude for the work done by them while here, and for their never failing desire to maintain its dignity and influence for good.

We will direct a minute of these proceedings to be made in our records, and will now adjourn for the day.

MARYLAND REPORTS.

October Term 1910 and January Term 1911.

STATE OF MARYLAND, USE OF CECIL F. LILLEY, vs. THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAIROAD COMPANY.

Accident at Railroad Crossing—Going Under Lowered Safety Gates.

Two girls, one twelve and the other sixteen years of age, walking along a street in a town, came to a railroad crossing where there were four parallel tracks. They found the safety gates lowered and a shifting engine was moving in front. When that engine stopped at the end of the crossing, the gates were not raised, but the watchman in charge stood leaning on them. The girls looked to see if a train was coming, but their view of the tracks in one direction was obstructed by the standing engine and cars attached to it. They then went under the lowered gates and crossed the first two tracks, but as they reached the third track a rapidly running train came along from the direction in which they had not been able to see. The older girl jumped back in time to avoid injury, but the younger one was struck and killed by the train. There was no evidence that those in charge of the train could have avoided the collision after seeing the girls. In an action to recover damages for the death so occasioned, *held*, that the jury was properly instructed to return a verdict for the defendant railway company, since it was not the duty of the watchman, after lowering the safety gates, also to warn the girls by word of mouth not to crawl under them, nor was he bound to anticipate that they would attempt to cross the tracks in the face of the danger signal of the lowered gates, and the injury was caused solely by the negligence of the deceased, who was acquainted with the crossing and of sufficient intelligence to know the meaning of the lowered safety gates.

Decided November 16th, 1910.

Appeal from the Circuit Court for Cecil County (ADKINS and HOPPER, JJ.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Joshua Clayton, for the appellant, submitted the cause on his brief.

Frederick T. Haines, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

This suit was brought, in the name of the State, for the benefit of the equitable plaintiff, for damages for the killing of his infant daughter by one of the trains of the appellee company at a public crossing of its tracks.

At the close of all the testimony, in the trial of the case below, the Court granted the prayer of the defendant instructing the jury to find a verdict in its favor for want of evidence legally sufficient to entitle the plaintiff to recover. The Court had refused to grant that prayer when offered at the close of the plaintiff's testimony.

The plaintiff offered two prayers both of which were rejected. The first of these prayers predicated the plaintiff's right to recover upon the finding by the jury that his daughter's death had been caused by the negligence of the defendant's servants in charge of the railway crossing; and the second asserted that, even though the plaintiff's daughter had been guilty of contributory negligence, if the jury found that after the railway's servants became aware of her perilous situation they "failed to make proper and reasonable exertions whereby her life could have been saved," he was entitled to recover.

The jury in obedience to the Court's instruction found for the defendant and from the judgment entered on the verdict in its favor the plaintiff took the present appeal.

Md.]

Opinion of the Court.

It was not contended by the counsel for the appellant that the servants of the appellee who were in charge of the train which struck and killed his daughter, were guilty of negligence, or that she had not been guilty of contributory negligence, at the time of the accident. The alleged negligence, upon which the plaintiff sought to recover was that attributed to the gate keeper at the crossing in failing to properly warn the daughter of the approaching train after he saw her put herself in a place of danger.

The only exception appearing in the record was taken to the Court's action upon the prayers offered at the close of the case. As the granting of the defendant's prayer taking the case from the jury necessarily involved the rejection of those of the plaintiff, they need not be separately considered by us, but all of the prayers can be disposed of together as presenting the opposing views of a single contention.

The material facts testified to on behalf of the plaintiff, which for the purposes of this inquiry must be taken to be true, are as follows: On May 5th, 1909, the appellant's daughter Ellen, then a little over twelve years old, and her half sister Mary Humphreys, then sixteen years old, were going together northerly along Main street in the town of Northeast, in Cecil County, with the intention of crossing the railway tracks of the appellee, at their intersection with that street, where there was a public crossing provided with a safety gate on each side of the tracks. When they reached the crossing they found an engine shifting cars across the street on one of the tracks and the safety gates lowered on both sides of the tracks. They stood on the street outside of the gate on the south side of the railroad until the shifting of the cars ceased. At that time the shifting engine was at rest with its front portion on a part of the crossing. Without waiting to be assured of clear tracks by the raising of the safety gate in front of them, the two girls went under or around the end of the lowered gate and attempted to cross the railway. There were four parallel tracks at that point. The

girls crossed in safety the first one, on which the shifting engine and cars stood, and also the one beyond it, but when they reached the third track a freight train came along on it at a rapid rate of speed. Miss Humphreys by quickly jumping back saved herself from injury, but the appellant's daughter was struck and killed by the locomotive of the moving train. Miss Humphreys testified that while she and her companion were still outside of the safety gate, before they started across the railway tracks, they both looked and listened for trains but neither saw nor heard any. She said they looked in both directions and that their view was unobstructed up toward Elkton but they could not see in the other direction—the one from which the train came upon them—because the view was obstructed by the tender of the shifting engine with the cars attached to it and also by some cross-ties piled between the freight house and the crossing. She did not say that they looked or listened again for trains after they had passed the shifting engine, where they could have seen the coming train if they had looked for it. On the contrary when she, having testified that they looked before they started across and that they were standing outside of the gate at that time, was asked if that was the only time they looked, she repeated the statement that they looked before they started across and that they could not see because of the shifter and the ties.

The same witness testified that while she and her companion were attempting to cross the tracks McDowell, the railway servant in charge of the safety gates, stood at the watch box at the gate, on the side of the railroad toward which they were going, with his arms crossed leaning on the lowered gate looking toward them all of the time and that he did not call to them. She further said that she and her companion who was killed were familiar with the locality of the accident and had frequently gone over the tracks at that crossing.

Md.]

Opinion of the Court.

Harry W. Simpers, an eye witness of the accident, gave testimony for the plaintiff tending to corroborate Miss Humphreys' account of the occurrence. He said that he first saw the two girls standing outside of the safety gate and that when the shifter went back they started across walking side by side. He further said that he next "heard somebody holloa or call" and that was what attracted his attention most and that he looked and the girls "stopped on the northbound track and one started back and the other started across. That time the approaching train struck the girl." He said he supposed "that holloaing confused them." He testified further that McDowell the gateman was standing at his post at the safety gate at the time, but he could not tell whether "the holloaing" came from McDowell or not. It came from up the track. The evidence on behalf of the defendant tended to support the plaintiff in that it showed that the "holloaing or calling" heard by the witness Simpers came, not from McDowell, but from other employees of the defendant who were engaged in repairing the platform of the railway station at the crossing.

Upon that state of facts it is insisted on behalf of the appellant that, although his daughter was culpably negligent at the time of the fatal accident, the failure of the gate keeper to give other and further warning to the two girls, when he saw them approaching the track on which the train was coming, than that of keeping down the safety gate in their plain view, brings the case within the operation of what is known as "the last clear chance" rule, and renders the defendant liable for his daughter's death. That claim is made upon the authority of *Kehoe's Case*, 83 Md. 434; *Neubour's Case*, 62 Md. 391; *Kean's Case*, 61 Md. 154; *McNab's Case*, 94 Md. 719; *Tolson's Case*, 139 U. S. 551; *Ives' Case*, 144 U. S. 408, and others.

In those cases it was held that if the servants of a railway company who are in charge of a moving train or car become

aware of the presence of a person on the tracks ahead of them in time to so control the train or car of which they are in charge as to avoid injuring him, it is their duty to do so, even if such person has put himself in a place of peril by negligent or reckless conduct, and that for their failure to use due diligence to avoid injuring him, their principal will be liable. In the case now before us it is conceded that the servants of the defendant who were in charge of the train which struck and killed the plaintiff's daughter were guilty of no negligence at all. That fact differentiates this case in that respect from the cases to which the doctrine of the last clear chance has been applied by this and other Courts.

Here the only negligence with which the defendant is charged is that of which the gate keeper is alleged to have been guilty in failing to call out to or otherwise warn the appellant's daughter of the coming train when he is said to have seen her and her companion actually crossing the tracks. But was he guilty of any negligence in the discharge of his duty toward them? He had warned them of danger as they approached the crossing by lowering the safety gate in their faces. He had continued to warn them of further danger, after the shifting had been suspended or completed, by maintaining the gates in a lowered position in their plain sight. That was the most appropriate warning he could give them. With the gates still lowered the danger signal in full sight, the two girls deliberately disregarded the warning provided by law for their protection and fully displayed by the gate keeper. Even when they had passed the shifting engine and were going toward the track on which the train was approaching he continued to warn them of their danger by keeping the gate lowered in their full view, and, in accordance with the testimony of the survivor of them, showing by leaning on it with folded arms that the time had not arrived when it could with propriety be raised. If they acted upon the mistaken belief that the gates were down solely because of

Md.]

Opinion of the Court.

the shifting of cars, it was their misfortune for which the appellee should not be held liable.

Even when the gate keeper saw the two girls approaching the track on which the train was coming it was not his duty to anticipate that, in spite of the danger signal of the lowered gate plainly visible to them, they would attempt to cross in advance of the coming train. On the contrary, as we held in *Neubeur's Case*, 62 Md. 401; *Savington's Case*, 71 Md. 590; *McNab's Case*, 94 Md. 729, and *McMahon's Case*, 97 Md. 487, the gateman "would have been fully justified in supposing that they would not venture to cross until after the passage of the train." If we so held in those cases, in none of which was the person, approaching or upon the railway track, warned of impending danger by a lowered safety gate, how much more strongly does the principle there announced apply to a case like the present one, where the persons approaching the track had open to their view at every step they took a positive warning to halt before they reached it? As the evidence on behalf of the plaintiff shows that his daughter was employed in a shirt factory and was able to earn seventy-five cents a day, if she worked industriously, it must be presumed that she had sufficient intelligence to appreciate the significance of the position and movement of the safety gates at the railway crossing with which she was so familiar.

In view of the facts of this case to which we have referred we do not regard it as falling within the operation of the last clear chance rule, but we are of opinion that the learned Judge below was correct in his rulings upon the prayers, and will therefore affirm the judgment appealed from.

Judgment affirmed with costs.

FERDINAND C. LATROBE, JR., ET AL., vs. ANDREW
J. DIETRICH ET AL.

*Testimony in Rebuttal in Equity—Bill to Vacate Contract for
False Statements—Insufficient Evidence of Fraud—Delay
in Disaffirming Contract—Executed Contract by Infant.*

A party to an equity cause should not be allowed to testify in rebuttal as to matters which were alleged in the bill as the principal ground of the relief asked for, and concerning which he could have given his testimony in chief before the evidence of the defendant was taken.

Plaintiffs, as partners, bought 250 of the 300 shares of a Foundry Company from the defendants, and after the business had been turned over to them filed the bill in this case asking that the contract be annulled on the ground of false statements made by the defendants concerning the business of the company. These statements were that the Foundry Company did an annual business of a certain amount; that a trial balance submitted to the plaintiffs showed a certain annual profit, and that the defendants would furnish to the company a certain amount of business monthly. Upon an examination of the evidence it is *held*, that these allegations are not sustained; also that the contract between the parties was made before the trial balance was produced; that the books of the company, which fully disclosed all of its affairs, were within the control of the plaintiffs before the transaction was completed, and that consequently the plaintiffs are not entitled to the relief asked for.

One who is induced by the fraud of another to make a contract is put to an election, when he discovers the fraud, either to avoid the contract or to abide by it. If he elects to avoid, he must act within a reasonable time after discovering the fraud; and if thereafter he deals with the subject-matter as his own property he cannot disaffirm the contract.

Md.]

Opinion of the Court.

An infant and an adult, as partners, bought certain property, and afterwards filed a bill to vacate the contract on the ground of fraud. The evidence fails to show that any fraud was practiced; and since the infant plaintiff had enjoyed the benefit of the contract, which was executed, he cannot recover from the defendant any part of the money paid by the partnership.

Decided November 18th, 1910.

Appeal from the Circuit Court of Baltimore City (STOCK-BRIDGE, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

John E. Semmes and Joseph C. France (with whom was *Jesse N. Bowen* on the brief), for the appellants.

S. S. Field (with whom was *John S. Biddison* on the brief), for the appellees.

BOYD, C. J., delivered the opinion of the Court.

Ferdinand C. Latrobe, Jr., by his father and next friend, Ferdinand C. Latrobe, Sr., and John C. Shane filed a bill in equity againsts Andrew J. Dietrich and Hammond Dietrich individually and as co-partners, trading as Dietrich Brothers, by which the plaintiffs sought to have a transaction between Mr. Latrobe, Jr., and Mr. Shane, of the one part, and the Dietrich Bros., of the other part, annulled and set aside. We will refer to Messrs. Latrobe and Shane as appellants, for although, by reason of the minority of Mr. Latrobe when the bill was filed, he sued by his next friend, before the decree below was passed he had reached his majority and the appeal was taken on behalf of him and Mr. Shane.

The appellants purchased from the appellees two hundred and fifty shares of the capital stock of the Baltimore Foundry

Co., for which they paid \$10,000.00 cash, gave their four notes of \$2,500.00 each, which were endorsed by Mr. Latrobe, Sr., and also gave a note of the Baltimore Foundry Co. for \$15,000.00, making \$35,000.00, the purchase price agreed upon for the two hundred and fifty shares. The total amount of the capital stock of that company was \$30,000.00, and the appellees retained fifty shares of the par value of \$100.00 each. The bill alleges that the appellees knowingly and intentionally made misrepresentations and false statements to the appellants for the purpose of inducing them to purchase the stock, and that the appellants, relying on the statements and representations, purchased the stock on the strength thereof. It is also alleged that Mr. Latrobe, Jr., was at the time of entering into the agreement under twenty-one years of age, and had not yet reached that age, and that in view of his infancy he was advised that he was entitled to have the contract set aside and rescinded, so far as he is concerned.

The testimony shows that the negotiations for the purchase were begun by a letter from George A. Finch, a member of the Baltimore Bar, who represented the appellants, addressed to the company, stating he had an inquiry from a client as to whether "your company and plant could be purchased". Mr. Andrew J. Dietrich, the president, who together with his brothers held the stock, called upon Mr. Finch in response to the letter and, after consulting with his brother Hammond, who was his partner, named \$40,000.00 as the price. On August 31st, Mr. Finch wrote to Mr. Dietrich that he had communicated his message to his clients, "and would request that you send me at your earliest convenience not a detailed inventory, but a general statement of the property belonging to the Baltimore Foundry Co., with your valuation of each item mentioned in said statement." He further said that his clients thought the price rather high, but if he would send him "a general statement of the property at the foundry," together with his valuation, he would be glad to arrange at

Md.]

Opinion of the Court.

an early date a meeting of his clients with him "for the purpose of arranging to take over the Company, if the price can be agreed upon."

The next day Mr. Dietrich replied that they did not feel inclined to give an itemized list at that time, unless it was agreeable to Mr. Finch for him to meet his clients, "and I would then bring with me a list showing the items that would go with the transfer of the property." The correspondence resulted in Mr. Latrobe meeting Mr. Dietrich in Mr. Finch's office the early part of September, when Mr. Dietrich gave him, as stated by Mr. Latrobe, "a pencil memorandum of the foundry and what was at the foundry, and he told me the price the foundry was for sale for." Mr. Latrobe said he had that statement until about the 15th of September, when he returned it to Mr. Dietrich. The aggregate of the valuations placed upon the various items in that statement by Mr. Dietrich was \$31,753.00. They again met in Mr. Finch's office on September 24th, according to Mr. Latrobe. Of that interview Mr. Latrobe testified that: "Mr. Dietrich went into the foundry, and said one thing about the foundry, said it was doing a business of \$150,000.00 a year and making a profit of \$18,000.00, and I told him that I would close the deal, meaning of course to ask the consent of my partner." He also said that the terms were then agreed upon (which are above stated), and the consummation was reached on his part, subject to Mr. Shane's approval, and on Mr. Dietrich's part, subject to his brother's approval. At that interview Mr. Finch, Mr. A. J. Dietrich and Mr. Latrobe, Jr., were all that were present.

The misrepresentations relied on by the appellants are: First, that the defendants represented that the Baltimore Foundry Co. was doing an annual business of \$150,000.00; second, that the defendants submitted to the complainants a trial balance which showed a profit for nine months of 1909 of \$18,014.68; third, that the defendants represented that Dietrich Bros. would give the foundry company business

amounting to \$5,000.00 per month, and in the testimony, although not alleged in the bill, it is also stated that it was represented that the company was making a profit of \$18,000.00 a year. We will consider those charges in the order in which we have mentioned them, together with certain other matters to be hereinafter referred to.

1. Mr. Dietrich was quite positive that he did not meet Mr. Latrobe at Mr. Finch's office on September 24th, but it is not material as to the exact day, as it was about that time. He does, however, positively deny that he ever told him that the company was doing a business of \$150,000.00 a year, but admitted that at one of the meetings he did say that it was doing from seven to ten thousand per month. Mr. Finch is equally positive that Mr. Dietrich did not say that the business amounted to \$150,000.00 a year but his recollection is that he said it was \$120,000.00. He was asked: "You don't remember what the amounts were, do you remember whether he said so much a year or so much a month?" and replied: "I can't recall that, but it is distinctly in my mind it was \$120,000.00 a year, whether he said \$100,000.00 or \$120,000.00 I can't recall, but the amount \$120,000.00 is imbedded in my mind, but I am sure he did not say \$150,000.00 or \$180,000.00." The only other testimony on that subject, in addition to that of Mr. Latrobe, was that of Mr. Shane. He spoke of making the \$15,000.00 note by reason of the representation of \$150,000.00 a year, but the following testimony was then given by him: "Q. Representation made by whom? A. Well, by my partner Ferdinand C. Latrobe. Q. As to the \$150,000.00? A. The \$150,000.00 and the \$18,000.00 profit on that business of \$150,000.00 a year. Q. Who made the representation as to the \$150,000.00? A. At that time at one of the meetings at the foundry Mr. Dietrich and Mr. Latrobe and I were there together and Mr. Dietrich on the balcony says, 'we were doing a business of \$150,000.00 a year and being you and Mr. Latrobe are interested down here you ought to raise it to \$180,000.00.'"

Md.]

Opinion of the Court.

That testimony was given by Mr. Shane when called in rebuttal, and it was excepted to and ruled out by the Court below. It was not proper evidence in rebuttal. Courts of Equity should not draw fine distinctions between evidence that is properly in chief and that properly in rebuttal, but Mr. Shane was a party to this cause—was seeking the aid of the Court on serious charges made in the bill by him and Mr. Latrobe against the defendants, which not only might affect them financially but would reflect upon their characters, if true. Although the allegations were made in the bill, that the defendants represented that the “company was doing a gross annual business of \$150,000.00, which could be increased by judicious management to the sum of \$180,000.00 annually,” and although that was specifically denied in the answer, Mr. Shane was not called as a witness in chief, but was called after the defendants concluded their testimony, and after Mr. Latrobe had testified in rebuttal. To permit him to testify under such circumstances would be a dangerous precedent, and the Court below was unquestionably correct in ruling out his testimony, but even if it could be considered, Mr. Dietrich positively denied it and Mr. Latrobe did not sustain him as to such testimony on the occasion he spoke of. Mr. Latrobe said the statement was made when Mr. Finch and Mr. Dietrich were present—on September 24th.

Mr. Finch testified that in the conversations he heard Mr. Dietrich and Mr. Latrobe agree that the purchasers could increase the business to \$150,000.00 or \$180,000.00 in the next year by reason of their facilities for handling and getting business. It is, therefore, probable that Mr. Latrobe’s impression as to the amount of the business said to have been done was received from confusing that with what was said could be done, but, however that may be, it cannot be said, in view of the testimony of Mr. Dietrich and Mr. Finch, that that charge is sustained by the evidence—on the contrary, it is shown by the weight of the evidence not to be correct.

The books of the company show, as alleged in the bill, what business was done,—being from something over \$90,000.00 to a little over \$117,000.00 per annum, averaging about \$8,000.00 per month, and it would be remarkable if parties engaged in a transaction of this character would rely on the statement of one of the vendors, when the books so clearly spoke for themselves. It might be possible that Mr. Latrobe, by reason of his lack of experience, would conclude a deal on the mere statement of one of the vendors, but the testimony shows that he had the benefit of the advice of those who would certainly know better. It is difficult to believe that if Mr. Dietrich be the character of man that even the appellants say he is, he would have been so foolish, if no higher motive influenced him, as to grossly misrepresent the amount of business done and the profits received, in order to induce the purchase, and then turn over the books to them five days before he and his brother were paid the \$10,000.00 in cash, as he did. Any competent bookkeeper could surely have ascertained the facts in a day or two. Mr. Farley, the bookkeeper of the company, was retained by the new management and ought to have been able to give such information in that time, if not in much less time. In addition to that Mr. Bailey, an experienced accountant, was elected secretary and treasurer of the company, and whether he took advantage of it or not, had full opportunity to examine the books, or have them examined, from October 2nd, when he was elected secretary and treasurer, to October 7th, when the money was paid. Moreover, Mr. Bailey testified that at the meeting on October 2nd he asked that a statement be submitted before going further in the transaction, and said that, "There was no definite plan or policy decided upon with regard to the terms of payment except that no payment should be made until we had an opportunity to look at the trial balance." It is almost inconceivable that if the amount of business done by the company was an inducing cause in concluding the purchase, one of his experience would have relied on a mere

Md.]

Opinion of the Court.

trial balance as of October 1st, 1909, without ascertaining the amount of business done which a trial balance would not show. Moreover, there was no occasion for asking Mr. Dietrich to procure the trial balance, as it is admitted that the new officers were elected on October 2nd.

So from whatever standpoint we view the case, it is clear that the plaintiffs did not sustain the charge as to the amount of business done.

2. The testimony as to whether the defendants represented that the profits which had been made were \$18,000.00 a year was ruled out by the Court below on the ground that there was no such allegation in the bill, but we will not discuss that ruling as we are satisfied the plaintiffs failed to establish the charge. What was said in reference to the representation as to the amount of business done is for the most part applicable to the one concerning the amount of profits, as both of those charges practically depend upon the same testimony.

But it is alleged in the bill that a trial balance as of October 1st, 1909, was furnished which showed a profit of \$18,-014.68 for the nine months preceding that date, and it is contended that that was not only false, but was one of the inducements which led the appellants to purchase the stock, or at least that it misled them to believing that the company was making profits. Mr. Bailey who stated, as shown above, that no payment was to be until they could see the trial balance, admitted on cross-examination that he did not ask Mr. Dietrich for it, but he asked Mr. Latrobe to secure it. Mr. Finch, who was representing the appellants, said it did not enter into the negotiations at all, and the evidence does not satisfactorily explain who gave it to the appellants. Mr. Latrobe said in answer to "Who produced it?" "I think Mr. Dietrich, sir," but Mr. Dietrich positively denies that and some circumstances show that Mr. Latrobe was mistaken. He said that the trial balance was at Mr. Finch's office on October 6th. A letter dated October 7th from Mr. Bailey to Mr.

Finch is as follows: "Enclosed you will please find a statement received by me from the Baltimore Foundry Company showing the list of Accounts Receivable and Accounts Payable amounting in the first instance to \$15,368.48. and in the second instance to \$8,136.76, being open book accounts as of October 1st, 1909, as reported by them. I also enclose a statement dated October 1, 1909, showing the Assets and Liabilities, including merchandise on the liability side, and sundry expense items on the assets side. None of these accounts have been verified, but it is understood that the amounts are acceptable to the parties concerned." That letter is signed by Mr. Bailey as "Secretary Baltimore Foundry Company of Baltimore City." If the statement was in Mr. Finch's office on the 6th, it is not easy to see why Mr. Bailey sent it to Mr. Finch on the 7th. Mr. Farley testified that he made the trial balance up on October 4th and he handed it to a young man in the office and did not know what became of it. It must be remembered that that was after the new management took charge, and the regular way would have been for the "young man" to give it to Mr. Latrobe, as president, if not to Mr. Bailey, as secretary and treasurer. Mr. Farley said he had made up a trial balance every month, which was kept in a book for that purpose, and, prior to the one on October 1st, they were either mailed to or handed to Mr. Dietrich. Mr. Dietrich was formerly the president of the company, but on October 2nd Mr. Latrobe was elected president, and hence the most reasonable explanation would be that it was given to or sent to Mr. Latrobe, especially as Mr. Bailey testified: "I think I asked Mr. Latrobe to try to secure a statement." That was on October 2nd.

But if we pass that by without further comment, it is impossible to find from the testimony that the trial balance authorized the charge in the bill that the defendants were guilty of knowingly and intentionally making misrepresentations and false statements for the purpose of inducing them to purchase the stock. In the first place we do not under-

Md.]

Opinion of the Court.

stand how any one could thereby be misled into believing that the company made \$18,014.68 that year or during any other particular period. Mr. Farley, the bookkeeper, testified that no one can tell from a trial balance at the end of the month whether there was any real profit or not. He was a witness for the appellants, and as he was the bookkeeper who made out the trial balance, his testimony ought to be convincing on that subject.

A good deal was said at the argument about the Dietrich Brothers marking off an indebtedness of \$61,211.15, which the company owed them, and it is alleged in the bill in connection with the trial balance. That was done as of September 30th, and it is conceded that the books showed the whole transaction. Mr. Bailey said he could have found out that item in "a couple of seconds if I had taken the trouble to look at the books." Mr. Finch testified that he told Mr. Dietrich they did not want "any detailed inventory; we simply wanted a general statement of the premises and property of the company because Mr. Latrobe had directed me to get a price on the cost of the plant and for that reason he simply wanted to take over the cost of the property and its capital stock, without any assets or liabilities, not to take over the company as a going concern with respect to all its property, debts, and accounts due, company's bills, and so on, but simply to get an idea of what the company owned in the way of property outside of the open account, and that letter was a request for that particular statement." Again he testified that "Mr. Dietrich said to Mr. Latrobe, You know, Mr. Latrobe, that none of us have made any money in the foundry, and all that we want the plant to do is to have our contracts well executed, but there is practically no profit, just to keep the men going and plant in business; and I think Mr. Latrobe replied to that, that he knew that scarcely anyone had made any money in the foundry business during the past year or more." Again Mr. Finch said: "I told Mr. Dietrich my clients knew pretty much about the Foundry Co.; that was told me by Mr.

Latrobe, he knew pretty much about it; he wanted to see the plant, and he saw the plant before the deal was closed, before the purchase price was agreed on, and Mr. Shane. I believe, examined the plant." He also said that Dietrich Brothers were to collect all accounts and pay all bills, and that "The transaction went through without any regard to the liabilities and assets and profits, as a basis of the transaction." It was undoubtedly necessary to cancel the indebtedness of the company to Dietrich Bros., if the appellants were to get the plant free from all liabilities. The appellants could not possibly be injured by that indebtedness being released, and if, as Mr. Finch's testimony shows, they were buying the plant regardless of profits, it cannot properly be said that the appellees suppressed material information by not telling the appellants of the indebtedness. At any rate, there is nothing to show that Mr. Dietrich had any reason to suppose that the appellants were interested in knowing that he had cancelled that debt and the books of the company clearly showed the whole transaction.

But regardless of all that, it cannot be doubted that the testimony shows that *the bargain* was concluded before the trial balance was furnished. Mr. Latrobe himself so testified, and they met on October 2nd for the purpose of consummating what was confessedly their agreement. Whether or not the four notes of \$2,500.00 each were actually delivered on that day is not so material in our judgment as the parties seem to have thought, judging from the amount of testimony taken on the subject. The fact is that Mr. Latrobe was elected president, Mr. Shane vice-president and manager, Mr. Bailey secretary and treasurer and Mr. Finch a director on that day, and the new management was put in control Saturday afternoon, October 2nd, or on October 4th, at the latest. The four notes were certainly endorsed by Mr. Latrobe, Sr., on or before October 4th, and the various agreements were executed as of October 2nd, although some of them were in fact executed at a later date. This trial bal-

Md.]

Opinion of the Court.

ance was not made until October 4th, and does not appear in the hands of any of the parties until October 6th or 7th. The cash was not paid until October 7th, and therefore there were at least four or five days before it was paid out after the appellants got control of and had in their possession the books of the company. If the theory of the appellants be correct, that the payment of the cash was postponed from October 2nd to October 7th, so they could get a statement of the affairs of the company, how could they better get it than from the books, which were in their possession or at least under their control? Can it be fairly said that the appellees were guilty of suppressing material facts—such as the \$61,000.00 item—or of misrepresenting the true condition of the company's affairs, when the books not only disclosed everything, but were so kept that the truth could be ascertained from them as to some items in a few minutes, and as to all in at least a day or two, and the books were actually placed in the possession and control of the appellants several days before the transaction was finally consummated by payment of the cash, delivery of the balance of the stock and execution of some of the agreements? If it had been shown that Mr. Dietrich had falsely stated that they had made profits of \$18,000 a year, and the appellants relied on that, that might be another matter, but as we have already said, the evidence in our judgment fails to establish it. If it had been shown that he had furnished the trial balance under circumstances from which it could be seen or inferred that he was attempting to mislead the appellants, and he had reason to believe the cash payment and final consummation of the transaction depended upon that, there might be some ground for the charge made against him and his brother; but as Mr. Finch who represented the appellants testified that the trial balance did not enter into the transaction, and especially as it was furnished at a time when the appellees were not in possession of the books, but the appellants were, it cannot be said that the appellees are to blame, much less that they were guilty of fraud.

even if the appellants were thereby misled, which the evidence does not establish.

It was suggested that the plant was not worth as much as the appellants agreed to pay for it, but under the circumstances disclosed by the record, there is certainly nothing to entitle them to relief on that account. If it be true that the cupolas or other property which the appellees sold them did not belong to them, it may be that in the appropriate tribunal the appellants would be entitled to some relief, but that is not involved, and not established in this case.

Without discussing the question, it is worthy of remark in this connection that fifteen thousand dollars of the thirty-five thousand dollars agreed to be paid were represented by the note of the company, which by the terms of the agreement in reference to it was to be paid in a way that practically relieved the appellants of personal liability, if the company did what it agreed to. As the appellees still hold one-sixth of the stock of the company, the appellants as the owners of the five-sixths would not have to bear all the burden of that note. But they cannot complain if they did make a bad bargain, in the absence of fraud or something kindred to it. *McShane v. Hazelhurst*, 50 Md. 131.

We might refer to other testimony and circumstances applicable to the questions already considered, but we have discussed them more at length than is usual or perhaps desirable. We will now as briefly as possible speak of the other questions raised.

3. The charge that the defendants represented that the amount of business which would be contributed to the company by Dietrich Brothers would be about \$5,000.00 per month is sufficiently answered by the agreement on that subject, and requires no further comment.

4. It might well be questioned whether, even if we had reached different conclusions as to the facts which we have discussed, the plaintiffs would be entitled to relief by reason of their action after they discovered what they alleged to be

Md.]

Opinion of the Court.

misrepresentations, etc. There is undoubtedly evidence of conduct after that time which would be difficult to reconcile with a decision to elect to rescind the contract. As was said in *Grymes v. Sanders*, 93 U. S. 55, "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." It is true that an innocent party is not bound to rescind a contract, if entered into by reason of the fraud of the other party, but he is put to his election of acquiescing in the agreement, or of avoiding it. "But if after he discovers the fraud he remains silent, under circumstances in which silence would indicate acquiescence; or if he act or deal in relation to the subject-matter in such a mode as to imply a willingness to stand by his bargain, he is considered as ratifying it, and he cannot afterwards avoid it. If he would avail himself of the fraud to avoid the contract, he must exercise his right of rescission immediately upon the discovery of the fraud, for if, after knowledge thereof, he deals with the subject-matter of the contract, as his own, he cannot repudiate the contract, although he should afterwards discover further circumstances connected with the same fraud." *Story on Sales*, sec. 159, cited with approval in *Clements v. Smith*, 9 Gill, 156. Or, as was said by JUDGE ALVEY, in *Foley v. Crow*, 37 Md. 51, "It is well settled that applications for rescission must be made without delay, and that the party seeking to rescind must come to his election as soon as the cause for rescission is discovered, so that the parties to the contract may be placed as nearly in *statu quo* as possible. This requirement is founded upon an obvious principle of justice." So we might cite many other cases, but they are all to the effect that the original party must act

within at least a reasonable time after discovery of the fraud, and what is a reasonable time must be determined by the circumstances. One of the important reasons for requiring promptness in such cases is to enable the other party to be placed as nearly as possible in *statu quo*.

In this case the appellants knew substantially as much on October 21st as they did when the bill was filed, but they waited until the early part of December before even complaining to the appellees, and then did not indicate a determination to rescind the contract. When the management of an industry such as this foundry is transferred from one party to another, it is highly important that there be no unnecessary delay, if the purchaser proposes and intends to rescind the contract on the ground of alleged fraud. After the discovery of what is made the basis of the application to have the contract rescinded, the appellants continued to hold the offices to which they were elected as the result of the contract, the appellees still dealt with them under the terms of the agreement, the appellants were still collecting accounts that belonged to the appellees, and the appellees continued to loan them money. Other acts indicating an intention to abide by the contract, and not to rescind it, were done by the appellants. Such conduct was not in accordance with the position taken by them in this bill, and if we were compelled to pass on that question, we would be inclined to deny the appellants' relief on that ground, but as we reached the conclusions already announced as to the facts we will base our judgment on them.

5. Another question is the effect of the minority of Mr. Latrobe. We are of opinion that the Court below gave him all the relief he was entitled to. The evidence shows that he and Mr. Shane were partners, and he testified that the deal was with them as partners, and that the purchase was intended by them as a partnership purchase. A contract of partnership between an infant and an adult is not void, but only voidable. The infant can avoid it, but the adult cannot

Md.]

Opinion of the Court.

rescind it, unless there be some ground for it other than the mere infancy of his partner. It is likewise the law that an adult is not relieved from liability because he has entered into a joint obligation with an infant, and sureties, endorsers and joint promissors are still liable. although an infant who is a party may escape liability. 16 *Am. and Eng. Ency. of Law*. 297. and cases cited in the note. In *Bush v. Linthicum*, 59 Md. 344, this Court adopted the opinion of JUDGE MILLER, who decided the case in the lower Court. That learned Judge thus stated the law: "All the books upon partnership lay down the proposition that an infant may become a partner with an adult. It is a contract not absolutely void, but one which the infant may stand to or repudiate at his election. While he remains a partner he has the rights and powers of a partner. He has equal right, with his co-partner, to the possession of the assets of the firm, to collect the debts due it, and he has also the power to contract debts in the name of the firm, which, though he may himself subsequently repudiate and get rid of responsibility therefor, are still binding upon his co-partner." It might, therefore, well be questioned whether this bill, which was filed by the two partners, could have been entertained on the ground of the infancy of Mr. Latrobe, as Mr. Shane could not for that reason be released, but the appellees have raised no question as to the correctness of the decree, and therefore we will not discuss the question.

The money was paid, the stock delivered, and the appellees have executed their part of the contract in all particulars. Inasmuch as we have held that the contract cannot be rescinded by reason of the alleged misrepresentations, etc., there is nothing that could be done for Mr. Latrobe except to discharge him from liability on the notes, unless he can require repayment of the money already paid. But, as we have seen, his infancy did not release Mr. Shane, and Mr. Shane would certainly not be entitled to have the money paid back simply because Mr. Latrobe was an infant. Presumably

it was partnership money, as it was paid by the partnership, and the rights of the respective partners to it are matters to be settled between them. It was said in *Browner v. Franklin*, 4 Gill, 463: "If the infant have already advanced money upon a contract, which is executory upon the part of the adult, he cannot disaffirm it, and sue the other party for the advance, whenever it was paid on a valuable consideration, which has been partially enjoyed, and especially, if he had received the benefit of his contract."

In *Adams v. Beall*, 67 Md. 53, this Court, through JUDGE ROBINSON, after citing some English cases to the effect that an infant after withdrawing from a partnership could not recover money paid by him as a consideration for being admitted into the partnership or for a lease of the premises occupied by the firm, held that, "Where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant (the adult), and he does become and remain a partner for a given time, he ought not to be allowed to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the appellant."

In *Wilhelm v. Hardman*, 13 Md. 140, the rule is thus announced, quoting from the syllabus: "Where an infant pays money on a voidable contract, and has enjoyed the benefit of it, he cannot avoid it and recover back his money; the rule which protects infants from liability on contracts will be allowed to operate reciprocally where it can be so applied. In cases where money has been paid by an infant, a distinction is always observed between those where he has derived no benefit from the money he sues to recover back, and those where the consideration has been partially enjoyed by him "

In this case the consideration was partially enjoyed by the infant, and he has derived such benefit from the money as precludes his recovery of it. It matters not that the business was not successful. It was said in *Adams v. Beall*, *supra*, "The business was not, it is true, a successful one. but this,

Md.]

Syllabus.

in the absence of fraudulent representations on the part of the appellant, cannot affect the question "

We do not deem it necessary to discuss the exceptions to testimony, as what we have said about that of Mr. Shane is sufficient to indicate our views as to those to his evidence, and there is nothing in the others which could affect our decision, even if we had reached a different conclusion from the Judge below as to those exceptions.

So without further prolonging this opinion, we will affirm the decree below. As the appeal was taken by Mr. Latrobe, Jr., and Mr. Shane after the former reached his majority, we will direct the costs in this Court to be paid by them, and will follow the decree as to the costs below.

Decree affirmed, the costs below to be paid by John C. Shane and Ferdinand C. Latrobe, Sr., the next friend of Ferdinand C. Latrobe, Jr., and the costs in this Court to be paid by the appellants.

ANN ELIZABETH RUSSELL vs. NELLIE E. CARMAN ET AL.

General Exception to Testimony in Equity—Deed Vacated Because Procured by Fraud.

When a part of the testimony of a witness in an equity cause relates to transactions had with a deceased person and is incompetent, and a part of the testimony relates to other matters and is competent, a general exception to all of the testimony of the witness, or a motion to strike out all of it, without designating the particular portions objected to, is properly overruled.

Plaintiff alleged that she was induced to execute a deed by reason of the false statement made to her by her niece that she was witnessing her sister's will. The effect of the deed was to reduce the interest of the plaintiff in certain real property from a fee simple to a life estate. *Held*, that the allegations of the bill are sustained by the evidence and that consequently the deed should be annulled and set aside.

Decided November 18th, 1910.

Appeal from the Circuit Court of Baltimore City (STOCKBRIDGE, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Robert P. Graham (with whom was *J. Hooper Edmondson* on the brief), for the appellant.

Julius H. Wyman (with whom was *John L. V. Murphy* on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

The bill in this case was filed by the appellant, Ann Elizabeth Russell, praying that a deed executed by her, conveying certain real estate to her sister, Maria Louise Russell, since deceased, be set aside and annulled on the ground that its execution was procured by misrepresentation and fraud practiced upon her by her niece, Nellie E. Carman. The bill alleges that the plaintiff and her said sister, Maria Louise Russell, were on the date of the execution of said deed, September 25th, 1906, seised and possessed as joint tenants, and not as tenants in common of certain real estate and leasehold property in Baltimore City, and that she was induced to sign her name to a paper then presented to her by said Nellie E. Carman, who assured her that said paper was the will of her said sister, Maria Louise Russell, and that she had

Md.]

Opinion of the Court.

no knowledge of the contents of the paper, or of its character until after the death of her said sister, in September, 1907.

The bill further alleges that on October 2nd, 1907, said Nellie E. Carman filed in the Orphans' Court of Baltimore City, a paper purporting to be the will of said Maria Louise Russell, which was admitted to probate, and in which said Maria Louise Russell devised and bequeathed all her estate to said Ann Elizabeth Russell for her life, and after her death, to the defendants, Wm. R. Magers, Fannie D. Magers, Ida A. McCrone and Nellie E. Carman, children of the deceased sister of the testatrix, whose name was Mary R. Magers, and by which will said Nellie E. Carman was appointed executrix without bond, and was authorized upon the death of Ann Elizabeth Russell to sell all said property and divide the proceeds among the parties last named above. The bill further alleged that said Maria Louise Russell was in bad health and of feeble mind, and that said deed and will would operate to deprive the plaintiff of the estate which she would take by survivorship on the death of her said sister in the property described in said deed, unless set aside for the fraud practiced in procuring its execution. A copy of said deed was filed as part of the bill, and it appears from the recitals of that deed that the property in question was conveyed to said Maria Louise Russell, Ann Elizabeth Russell, and Josephine A. Russell by two deeds from J. Hooper Edmondson, one dated January 16th, 1903, and one dated February 24th, 1903, duly recorded, and it appears in the evidence that Josephine died in 1904, and Maria Louise in 1907, leaving the plaintiff the sole surviving grantee under said deeds last mentioned.

Wm. R. Magers and Fannie D. Magers, two of the defendants, and also two of the four beneficiaries under the will of Maria Louise Russell, filed separate answers admitting the allegations that at the date of the execution of the deed of September 25th, 1906, Ann Elizabeth Russell and Maria Louise Russell were seised as joint tenants of the property in

question, and as to the allegation of fraud in procuring its execution, their answers stated that "from their information they believed the charges of fraud to be true."

Mrs. McCrone answered, alleging that she had no knowledge of the joint tenancy mentioned in the bill, and neither denied nor admitted it. She averred that she knew Maria Louise Russell collected and received all the rents of this property, during her life and that she never knew of any interest of Ann Elizabeth in said property. She disclaimed any knowledge of the execution of the deed of September 25th, 1906, but indignantly denied the imputation of fraud to Mrs. Carman.

Mrs. Carman answered, neither admitting nor denying the alleged joint tenancy, but denying that Maria Louise was of feeble mind, and averring that she was of sound and disposing mind when said will was executed, and at all times. She averred that she collected all the rents from said property and paid them over to Maria Louise as the owner of the property. She denied all fraud or misrepresentation as charged, and alleged that at the time said deed was executed, it was read and explained to Ann Elizabeth, who knew and understood its contents and purpose.

The testimony covers one hundred and thirty printed pages of the record and involves many contradictions. It is conceded by all the parties that the disputed property originally belonged to Henry Fowble, an uncle of Josephine, Maria Louise, and Ann Elizabeth, and that it was left by his will to Josephine, Maria Louise, and their brother George Russell, who has since died, and whose widow holds her dower in his share. It also is established by the admission of Mrs. Carman upon cross-examination, that about six weeks after the execution of the will of Maria Louise, on July 31st, 1906, Mrs. Carman found among the papers of Ann Elizabeth a deed of this property from Josephine and Maria Louise to one J. Hooper Edmondson, and also a deed or deeds from him reconveying this property to them, and she testifies that she

Md.]

Opinion of the Court.

delivered these deeds at once to Ann Elizabeth and Mary Louise, both of whom declared they knew nothing up to that moment, of the existence of such papers, and that both of them declared their purpose "*to rectify it,*" and that the deed of September 25th, 1906, was executed by Ann Elizabeth for the purpose of conveying any interest she might then or thereafter have in the property, to Maria Louise.

Ann Elizabeth testified that before Josephine's death in 1904 Josephine had a deed made by which this property was to go on Josephine's death to Maria Louise, and on her death to go to Ann Elizabeth. After Josephine's death, Ann Elizabeth and Maria Louise lived with Mrs. Carman for a time, and during that period in 1906, she testified that Mrs. Carman took her to the office of some lawyer whom she did not know, and whose name she could not remember, to sign a paper which Mrs. Carman said was a will of Maria Louise; that the paper was not read by her, nor read or explained to her by anyone, and that she signed her name believing it to be her sister's will, though her sister had never said anything to her about a will. She said Mrs. Carman collected all the rents and paid them to Maria Louise during her life, and that since her death, she had only received about two months rent from Mrs. Carman, who said she was putting the rents in bank.

Miss Fannie Magers testified that on Thanksgiving Day, in November, 1906, Mrs. Carman visited her and her brother Wm. R. Magers at their residence in New York City, and that at that time Mrs. Carman said to her in her bedroom, "I have something to tell you: You know that will that Will drew up and Mr. Graham had made, it was no good, and I have had it changed, and I have had a will drawn, and I have been terribly worried over it, and I have come to explain it," and she said "if my Aunt Elizabeth got the money in her possession, she knew what she would do with it, and she didn't want it disposed of in that way, and she said she had it fixed." Miss Magers asked her if Aunt Elizabeth knew it, and she

said "she did not," and she said "she didn't want her to know it, that she would get excited over it." Miss Magers further testified that subsequent to the death of Maria Louise, she went to her funeral in Baltimore, and the evening of the funeral Mrs. Carman and Mrs. McCrone called her in the next room, and said Ann Elizabeth "would receive the money from the rents and she wouldn't know the difference," and Miss Magers replied the will would be read to her Aunt "and she would be rewarded some way;" and that Mrs. Carman and Mrs. McCrone told her not to say anything about the will. On cross-examination Miss Magers said her Aunts Maria Louise and Josephine told her that they had employed Mr. Graham to draw a deed, and that "it was all fixed, one for the other, and the longest liver would receive it all."

Wm. R. Magers testified that before the death of his Aunt Josephine he came on from New York, in 1903, "that Aunt Joe wanted her affairs fixed, and her whole mind was that whenever she or whoever died first to have some kind of document drawn so that it wouldn't get into Court; that he, with request, had Mr. Graham draw up the paper which was read and discussed to them, and which they signed and it was recorded; and that Aunt Joe was the head of the family, and attended to all the business."

He further testified that Mrs. Carman was at his house in New York on Thanksgiving Day, 1906, that she came into the library in the evening, and told him "that she had a paper drawn up and had Aunt Elizabeth to sign it, and that she had told Aunt Elizabeth it was Aunt Lou's will she wanted her to sign, * * * that she did not read it to her—it would just upset her and do no good; that she did not tell him anything about the contents of the paper, but asked him if he thought she had done right, and that he, knowing about the former documents that were drawn up, replied that he presumed it was all right."

He further testified that shortly after the death of Maria Louise he went to Baltimore, and Mrs. Carman told him

Md.]

Opinion of the Court.

Aunt Maria had left a will, and asked him to open it, which he did and read it to Aunt Elizabeth, Miss Magers and Mrs. Carman; "that there were some hard things said on both sides, especially by Mrs. Carman, who said she had done it for the best," and that he knew nothing about the deed from Ann Elizabeth to Maria Louise, until after the will was read, and then he and Mr. Edmondson "went to the Courthouse to get our eyes opened and saw the document there; that Mrs. Carman said: "What difference will it make to Aunt Elizabeth, she will get her money as long as she lived anyway, and she thought she had done for the best in having the will made."

When the general question was read to Mr. Magers at the close of his examination he said: "I don't want to sign that yet; I want to look over some memoranda I made when the will was read;" and then, after refreshing his memory from those memoranda, he testified further: "On October 1st the will was read and Mrs. Carman said to all in the room—"It was none of your business if Louisa did make a will, and it was no use to tell you. I didn't read the paper to Aunt Elizabeth as she would not understand it"; that is her exact words that I copied."

Rev. Dr. Joel T. Rossiter, pastor of Maria Louise for over thirty years testified that Ann Elizabeth nursed her throughout several years of failing health; that she spoke to him about making her will before Mr. Magers went to New York; that she seemed worried that her sister had not shared in their uncle's will and that after Mr. Magers had moved to New York, she told him that he "had had a paper drawn up by which as they died, the estate should go to the living, and that whoever died last would get the remainder, and that this arrangement seemed to give her peace and satisfaction.

Miss Annie Troll, who had known all the parties all her life testified that Maria Louise told her after she moved to Mrs. Carman's "that the two sisters had arranged their affairs, and that their property was all to go to the longest liver.

Mrs. McCrone testified at considerable length principally about the mental characteristics and capacity of her aunts, but had no knowledge of the facts relating to the will and deed in question. It is proper to say that her testimony was marked by absolute fairness and impartiality, and evinced a high degree of intelligence. Mrs. Carman testified in chief that she went with Ann Elizabeth on September 25th, 1906, to the office of Mr. Orem, a notary public; "that her Aunt Elizabeth went of her own free will and the solicitation of her sister, Maria Louise, to deed back certain properties to Maria Louise so she could dispose of them as she saw fit. That she, herself, read the paper to her two aunts, and Ann Elizabeth read it herself, and that she signed it first on the wrong line, and then signed again."

She denied that she told Ann Elizabeth the paper was her sister's will. She said Ann Elizabeth selected Mr. Orem from a list of notaries, for the purpose of executing the deed and that she understood fully what she was doing. She admitted that she had an interview with her brother Wm. R. Magers, and her sister, Fannie Magers, on Thanksgiving Day, 1906, at New York, but she utterly denied that she had told either of them anything they stated occurred at those interviews, and that all she told them was that Maria Louise had made a will. On cross-examination she testified that Mr. Wyman drew the will from "a digest" which she took him from her Aunt Maria.

She said that when this will was executed her Aunt Maria knew nothing of the deed from them to Edmondson nor of his reconveyance to them, and that her Aunt Maria believed Ann Elizabeth had no interest in the property, and that she herself discovered the true situation and communicated it to her two aunts. Her account of this discovery and of what followed is singular to say the least.

She says: "I went up on the third floor for an article I needed and I found a paper; I opened it and saw it did not belong to me; it was in a bag of waste paper, old letters they

Md.]

Opinion of the Court.

had torn up, and I took it straight down and gave it into the hands of Aunt Elizabeth. That paper was a deed. They told me so about *three o'clock the same afternoon. I went upstairs* and they *had read it*. They both said positively and emphatically that they did not know one thing about it, and asked me to explain it to them." A moment later she said, when asked what Ann Elizabeth did when the paper was handed her, "she read it aloud to her sister because her sister had no glasses strong enough to use. *At that time* I did not know who the deed was from. I went up there about three o'clock and then they told me about it * * *. It was a deed from Maria Louise and Josephine to a man by the name of Edmondson * * *. After I told her exactly what the thing meant, Maria Louise said she had never seen the paper and she would go herself to the Orphans' Court if Ann Elizabeth did not have it rectified, and Ann Elizabeth was very glad to have it rectified ***. Then I went to Mr. Wyman and he said Maria Louise insisted upon having her property in her own name, and Ann Elizabeth was perfectly willing to give back what did not belong to her." After giving this account of the one deed to Edmondson, on further cross-examination she said she found another deed from Edmondson reconveying the property to her two aunts, "that the two were altogether" but she nowhere says that she gave this deed to either of her aunts, or told them anything about it, and she said when speaking of the last mentioned deed, "that *both* papers were together *lying on the top of a box*," though she had a moment before said the first mentioned deed was "in a bag of waste papers." She also said that Ann Elizabeth declared "*she* had never been anywhere to sign any paper and that no one had ever come to them;" but when reminded by the appellant's counsel that she had said the deed was from Josephine and Maria Louise only, to Edmondson (Ann Elizabeth up to that time having no interest in the property), she said Ann Elizabeth "declared that Maria Louise had never been anywhere to sign them, and there had never been anyone to the house to

sign them," but she did not say that *Maria Louise* denied she had signed the deed to Edmondson. It is certain however, if disinterested and unimpeached testimony is to be allowed any weight whatever, that as a matter of fact *Maria Louise* did know that she had signed the deed to Edmondson, and that she fully understood the purpose of that deed and of the reconveyance by him to herself and to Josephine and Ann Elizabeth, since Dr. Rossiter testified that *Maria Louise* told him that Mr. Magers had a paper drawn up, by which, as they died, the estate should go to the living, and that whoever died last would get the remainder, and that this arrangement gave her peace and satisfaction, and because *Aunie Troll* testified that *Maria Louise* told her that "the two sisters *had* arranged their affairs; their property was all to go to the longest liver." Ann Elizabeth testified that she knew this had been done, as her sisters told her so, but there is no occasion to dwell upon the testimony of an interested witness when the fact is established by disinterested witnesses. Mrs. Carman further testified that she went to see Mr. Wyman "to have some instrument prepared that would remove that trouble" and that he informed her "what would be necessary to fix it," and that she reported to *Maria Louise* who told her to have it done.

Miss Elizabeth A. Carman testified that she was in her own room across the hall, the doors being open, and heard her mother reading a deed to her two aunts describing the situation of the property, and that her mother and her Aunt Elizabeth went out, and that her aunt told her she was going to a notary's office to execute a deed.

Wm. H. Carman, the husband of Mrs. Carman, testified that *Maria Louise* told him they found these papers, and Ann Elizabeth was going to have them transferred back to her; and that both the aunts said these papers had never been signed and that the papers were a fraud, and that Ann Elizabeth was going to a notary to have them fixed.

Md.]

Opinion of the Court.

Mr. Orem, the Notary Public who attested the deed of Ann Elizabeth to Maria Louise of Sept. 25th, 1906, proved his signature and the execution of the deed by a woman presented as Ann Elizabeth Russell, whom he had never seen before or since, but he could not recall any circumstances attending its execution, and did not remember the deed being read to her.

There can be no serious question as to the law applicable to the facts of this case when these are determined, and we have set forth the evidence in detail in order that our conclusion as to the facts may be fully understood.

We will first dispose of the exception to the whole of the testimony of Ann Elizabeth Russell and the motion to strike out the same. It would be sufficient to say that the only exception to this testimony is found in the motion to strike out the whole of it, filed November 7th, 1909, after the testimony was closed on November 6th, 1909, and it nowhere appears in the record that the same was stricken out, or that the Court made any ruling thereon for review by this Court. But if the record showed that this motion had been granted we are of opinion that such ruling would have been error.

Under sec. 3 of Art. 35 of the Code, this witness was not wholly incompetent to testify, but was incompetent only "as to any transaction had with, or statement made by the testator, intestate, ancestor or party so incompetent to testify, unless called by the opposite party." *Such portions* of the testimony of this witness as related to conversations between herself and Maria Louise, or transactions with her *personally*, were of course open to objection, *properly taken*, but she testified to much not prohibited by the statute, and especially to the alleged false representation by Mrs. Carman that the paper which she signed before the notary was not a deed but her sister's will. That was not a transaction with her sister, but with Mrs. Carman, who was alive, and sane, and competent to testify as to the *transaction*, the alleged false representation, and did testify fully in relation thereto. Obviously,

therefore, the objection as made was too broad. *Brewer v. Bowersox*, 92 Md. 575. "The Court is not required, and cannot be expected to go through the testimony, and pick out such questions as are objectionable, because the witness is incompetent to speak of the subject referred to. * * * The defendants should have excepted to designated questions and answers, on the ground of the incompetency of the witness, if they desired the questions to be passed on by the Court below, or by this Court, and not having done so, they cannot be excluded under that general exception to her incompetency as a witness." *Smith v. Humphreys*, 104 Md. 289: and *Worthington v. Worthington*, 112 Md. 141.

It is true that a contract or conveyance ought never to be cancelled or set aside for alleged false representations unless their making and their falsity is clearly proved, and unless the complainant has been injured thereby. *Ranstead v. Allen*, 85 Md. 486. But when the Court is convinced by a careful examination of the testimony that such a representation has been made, to the injury of the complainant, the duty to annul the contract or set aside the conveyance is as clear and imperative as the duty to sustain it where the proof leaves the Court in doubt.

The important and controlling inquiry in this case is whether Mrs. Carman represented to Ann Elizabeth that the deed of September 25th, 1906, which she signed, was the will of Maria Louise, and thereby induced her to sign it. If such representation was made it was necessarily false, and as the consequence of that deed, if sustained, must be to reduce Ann Elizabeth's conceded fee simple in the property described in that deed to a life estate, the resulting injury to her is established.

The case is therefore reduced to the simple inquiry whether that false representation was made.

Ann Elizabeth testifies it was made, and that she signed the deed, believing it to be her sister's will. Mrs. Carman testifies it was not made, and that Ann Elizabeth knew and

Md.]

Opinion of the Court.

understood what she was signing. The Notary's testimony proves the execution of the paper, but throws no light upon the alleged false representation. Miss Elizabeth Carman testifies her Aunt Ann Elizabeth told her she was going to sign a deed, but did not say to whom or for what purpose. The testimony of Mrs. Carman's husband, Wm. H. Carman, is too vague to be important, and is inherently improbable in view of the proof of the deliberate previous arrangement of the three sisters, through the Edmondson deeds. The deliberate preparation and execution of those papers was proved by Wm. R. Magers, who procured it at their request, and their subsequent existence *among the papers of Ann Elizabeth* was proved by Mrs. Carman herself. She testified that she took these papers to Ann Elizabeth at once, and both her aunts declared they had never seen or heard of either paper, and declared their purpose to have them annulled. But three witnesses, Fannie D. Magers, Annie Troll and Rev. Joel T. Rossiter, swear positively that Maria Louise told them on different occasions that Wm. R. Magers had these deeds prepared at the request of Josephine and Maria, and that they were executed accordingly, and that their purpose was to secure the property to the longest liver; and Wm. R. Magers testifies that he had these papers drawn at their request, and that they were executed and recorded. Such testimony from four reputable witnesses, two of whom are without any interest, and two of whom testify against their own interest, must prevail over the testimony of one interested witness, and must **fatally discredit** her testimony upon a vital point in the case.

The testimony of Ann Elizabeth that Mrs. Carman procured the execution of the deed of September 25th, 1906, by representing that she was witnessing her sister's will, is confirmed by the testimony of Fannie Magers and Wm. R. Magers, before set out, both of whom swear positively that Mrs. Carman told them on separate occasions that she told Ann Elizabeth the paper she signed was Maria Louise's will: that she didn't read it to her because it would upset her:

Opinion of the Court.

[114]

that she didn't want her to know anything about it, and she thought she had done it for the best of all. Already discredited, as we have shown, in her statements about the Edmondson papers, she is still further discredited by the testimony as to her acknowledgment of the alleged false statement that the paper signed by Ann Elizabeth was her sister's will, and it is impossible to resist the conviction that she did make the alleged false statement and thereby procured the execution of the deed of September 25th, 1906. We forbear any reference to the will of Maria Louise further than to say that it is much to be feared that its execution was part of the scheme to deprive Ann Elizabeth of this property, and that it was obtained by some improper means.

It results from what we have said that the deed of September 25th, 1906, must be annulled and set aside.

Decree reversed and cause remanded that a decree may be passed in conformity with this opinion. Costs above and below to be paid by the appellee, Nellie E. Carman.

Md.]

Syllabus.

THEODORE A. K. HUMMELSHIME vs. JOSEPH
HIRSCH ET AL.

Mandamus to Try Title to Public Office—Parties—Right of Citizen and Taxpayer to the Writ—Charter of Cumberland—Taxes on Property of Councilman in Arrear at Time of Election—Payment on Day of Election Does Not Qualify—Insufficient Defenses to Mandamus to Oust from Office.

The object of a writ of mandamus is to compel the performance of some act which the petitioner has a clear legal right to demand shall be done by the respondent, and when the petitioner has no other adequate remedy to enforce that right.

A mandamus is the proper remedy to oust a person acting as a municipal officer from the office when he was not legally elected thereto, and to require him to vacate the same, since that is the performance of an act which the petitioner has a right to demand.

In this State the title of the respondent to an office may be tried in a mandamus proceeding where the petitioner claims title to the office and is not only seeking to oust the respondent, but also to obtain possession of the office.

When the object of a mandamus is to require a person acting as a City Councilman to vacate the office because he did not possess the statutory qualifications at the time of his election, it is not necessary that the petition should be filed against the Mayor and City Council to compel them to fill a vacancy on the ground that the respondent's election was void.

A citizen and taxpayer of a municipality is entitled to apply for a mandamus to try the title to office of a City Councilman and to oust him therefrom on the ground of disqualification, although the petitioner does not himself lay claim to the office.

The Charter of the City of Cumberland (Act of 1910, Chap. 306) provides, in addition to an age and residence qualifica-

tion, that "each Councilman shall be the *bona fide* owner of property to the value of \$500 and assessed for the same on the tax books of said city at the time of their election and for two years next prior thereto, the taxes on which shall not be in arrears." *Held*, that this provision as to payment of taxes relates to the time of election of a Councilman and not to the time of his qualification by taking the oath of office, and that consequently where a candidate for the office of Councilman was in arrears as to the taxes on his property on the day of his election, but paid the same afterwards, he is not entitled to the office.

The said Charter of Cumberland provides that the candidates to be voted for at an election for the City Council shall be selected at a primary election after the filing of an affidavit by them that they are qualified to hold the office, and that each Councilman shall be assessed on property to a certain amount at the time of the election, the taxes on which shall not be in arrears. The taxes on the property of a candidate for the Council were in arrears on the day of the election, but at three o'clock in the afternoon of that day he endeavored to pay them, but could not find the tax collector. *Held*, that even if he had paid the taxes at that time it would not have been sufficient to qualify the candidate, since it was the purpose of the charter that only those candidates who possessed the required qualification should be voted for at the election.

When a petition is filed by two persons asking for a mandamus to oust from a municipal office a person exercising its functions on the ground that he was not qualified at the time of his election, it is not a bar to the relief asked for that there is pending in Court an election contest between the respondent and one of the petitioners involving the claim of the latter to the office.

It is not a sufficient answer to a petition for a mandamus to try the title of the respondent to a public office to allege that one of the petitioners for the writ was actuated by malice and ill-will towards the respondent in filing the petition.

Decided November 30th, 1910.

Md.]

Opinion of the Court.

Appeal from the Circuit Court for Allegany County
(HENDERSON, J.).

The cause was argued before BOYD, C. J., PEARCE.
SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Benjamin A. Richmond and *David A. Robb* (with whom
was *D. Lindley Sloan* on the brief), for the appellant.

Albert A. Doub and *Walter C. Capper* (with whom were
W. C. Devecmon and *David J. Lewis* on the brief), for the
appellees.

THOMAS, J., delivered the opinion of the Court.

By the Act of 1910, Chapter 306, a new Charter was enacted for the City of Cumberland. Section 97 of this Charter provides that candidates for Mayor and City Council shall be nominated at a primary election "to be held on the second Tuesday preceding the general municipal election," and that "any person desiring to become a candidate for Mayor or City Council shall, at least ten days prior to said primary election, file, or there shall be filed for him, a statement of such candidacy" under oath, giving his place of residence in said city, stating that he is a qualified voter therein, that he is qualified to hold and is a candidate for a nomination for the office, and that he requests his name to be printed upon the primary ballot, "and shall at the same time file therewith the petition of at least one hundred qualified voters, requesting such candidacy," and stating that they know the candidate to be a man of good moral character and qualified, in their judgment, for the duties of such office. This section further provides that "the two candidates receiving the highest number of votes for Mayor shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for Mayor at the following general municipal election, eight candidates receiving the highest number of votes, or

all such candidates, if less than eight, shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for councilmen at such municipal election." By section 98 the Board of Election Supervisors of Allegany County are required to order an election to be held on the sixteenth day of May, 1910, and it provides that the manner of holding such election shall be governed by the laws of the State of Maryland regulating general elections, and that the Mayor and Councilmen elected at said election "shall hold office from the first Monday in June, 1910, until the first Monday in April, 1912, and until their successors shall have been duly elected and qualified."

On the 7th of June, 1910, the appellee, Joseph Hirsch, filed in the Circuit Court for Allegany County a petition for a *mandamus* against the appellant, in which he alleged that he was, and had been for many years, a citizen of and a voter and tax payer in the City of Cumberland, and as such was interested in having the affairs of said city "managed in an orderly and lawful manner, and by officers duly qualified to manage the same;" that by the terms of the Charter of Cumberland "Each Councilmen of said city must be the *bona fide* owner of property to the value of \$500.00, and be assessed for the same on the tax books of said city at the time of his election, and for two years next prior thereto, the taxes on which shall not be in arrears;" that at the election held on May 16th, 1910, the appellant, Theodore A. K. Hummelshime, "was returned as having been elected a member of said Mayor and City Council, to wit, as a Councilman, and is now assuming to act and is acting as such Councilman;" that at the time of said election the appellant was assessed on the tax books of the city with property of the value of \$500.00, but "that at the time of said election the taxes so assessed against" the appellant "were in arrears and unpaid, and remained so in arrears and unpaid for some days thereafter, and that by reason thereof said Hummelshime was not qualified at the time of his election, and is not now qualified

Md.]

Opinion of the Court.

to act as Councilman of the City of Cumberland." The petition further alleges "that the newly elected body of Mayor and City Council convened for organization on the morning of June 6th, 1910," and that the petitioner, by his counsel, on that day "appeared before said body and the said Theodore K. Hummelshime—and stated that he wished to protest against said Hummelshime's acting as Councilman, for the reason that he was disqualified at the time of his election;" that said body as a whole declined to hear any statement in reference to the matter "at that time and place, and said Hummelshime then and there stated that he had been duly elected and that he intended to and would act as Councilman." The petition then charges that by reason of the fact that the appellant was disqualified at the time of his election, the election of the appellant was void, and that it was his "duty to refrain from entering upon the discharge of the powers, privileges and functions of said office," and that it is now his duty to vacate said office, but that the appellant, wholly disregarding his duty in the premises, refuses to vacate said office, and continues to exercise the functions thereof, and the petitioner prays that a writ of *mandamus* may issue commanding the appellant to vacate the office of Councilman and to cease from exercising the functions thereof. On the 11th of June, 1910, the appellee, J. Semmes Devecmon, was made a party plaintiff in the case, and on the same day the Court passed an order requiring the appellant to show cause why the writ should not issue.

The appellant demurred to the petition, and the demurrer having been overruled, he filed his answer, in which he admits the facts alleged in the petition but denies that he was disqualified at the time of the election, and says that at the time of the election he was a *bona fide* owner of property to the value of \$500.00, and was assessed for the same on the tax books of the city at the time of his election and for two years prior thereto; "that, on the said sixteenth day of May before the hour of three o'clock in the afternoon, he, the

said Hummelshime, went to the office of Anthony Minke, the tax collector for said city, to pay any and all taxes which he at that time owed to the City of Cumberland for the fiscal year 1909-1910; that it was the custom and the duty of the said Minke to be at his office, which was then and is provided for him at the Water Works Building, on Green street, in the said city, from about the hour of nine o'clock in the morning until five in the afternoon, except for about an hour from twelve o'clock on, to receive the taxes from the taxpayers of the City of Cumberland and to give receipts therefor, which duty and custom was well known to this respondent at that time and for a long period of time prior thereto; that the said Minke was not at his office of tax collector as aforesaid, nor at the Water Works of the City of Cumberland, which is near thereto, and the said Hummelshime could not find him and did not know where he was, though the said Hummelshime inquired of city employees near said office who informed him that they did not know where the said Minke was and that, from their knowledge, he had not been around his office during that day, except once very early in the morning, but they believed he could be found somewhere on the streets in the business portion of the town, and there was no one at said office to receive said taxes which your respondent was ready and anxious to pay and to give him a receipt for the same, and your respondent did not know and could not find out where the said Minke was, so that said taxes could be paid, although he diligently endeavored to find said Minke for the purpose aforesaid; * * * that he, the said Hummelshime, owed the City of Cumberland no taxes other than those for the year 1909-1910 on the said sixteenth day of May, 1910; * * * that on the 23rd day of May, 1910, he paid to the tax collector of the City of Cumberland all taxes which had been assessed against him on the books of said city; that, on the second day of June, 1910, he qualified and took his oath of office before the Clerk of the Circuit Court for Allegany County, at which time he was the

Md.]

Opinion of the Court.

bona fide owner of property to the value of five hundred dollars and had been assessed for the same on the tax books of the said city at the time of his election and for two years next prior thereto, the taxes on which were not in arrears; that, on the sixth day of June he entered into his office of Councilman, at which time he was the *bona fide* owner of property to the value of five hundred dollars and was assessed for the same on the tax books of the City of Cumberland at the time of his election and for two years next prior thereto, the taxes on which were not in arrears, and that, by reason of his said election and having the qualifications of Councilman and having taken his oath of office at the time aforesaid, and having entered into his duties, as aforesaid, and still retaining all the qualifications necessary for him to have, and acting as City Councilman of Cumberland, which he now is, he is legally acting as such City Councilman and performing the duties thereof."

By the fifth paragraph of his answer the appellant alleges that the appellee, Joseph Hirsch, "has filed in the Circuit Court for Allegany County a petition for a recount of the ballots cast at the election held on May 16, in the City of Cumberland, as aforesaid, in which petition for recount the said Joseph Hirsch did allege that he, and not the said Hummelshime, was elected as a member of said Council, and that the said Hirsch had received a greater number of votes for said office than the said Hummelshime, which said petition for said recount of the ballots is now on file with the Clerk of the Circuit Court for Allegany County, and said case arising from said petition is now pending in this Court, and that the petition for this mandamus does not lie for the reason that the issuing of the same would cause great confusion in the management of the government of the City of Cumberland." The answer further charges as a reason why the writ should not issue, that the petition "was filed by the said Joseph Hirsch from reasons of spite, hatred, malice and ill will on his part," and that the appellee, Devecmon, joined

in the petition at the request of said Hirsch; that the petition was filed for the purpose of embarrassing the appellant in the conduct of his office, and not from any "motive of public spirit or of doing a good and proper action in the interest of the voters and taxpayers of the City of Cumberland." The petitioners demurred to the answer, and this appeal is from the orders of the Court below overruling the demurrer to the petition, sustaining the demurrer to the answer and directing the writ to issue.

The several questions presented by these demurrers are:

1. Is *mandamus* the proper remedy to oust a municipal officer from an office to which he was not legally elected?

2. Does it lie at the suit of a citizen and taxpayer who makes no claim to the office?

3. Does the provision of section 100 of the Charter, to wit, "the taxes on which shall not be in arrears," relate to the time of the election of a city councilman or to the time of his qualifying?

4. If the provision of section 100 refers to the time of his election, does an effort on the part of a candidate to pay his taxes at three o'clock on election day, and payment of the same several days after the election, relieve him of the disqualification?

5. Is it a sufficient answer to the petition of citizens and taxpayers for a *mandamus* to oust a municipal officer from an office to which he was not legally elected, to say that there is pending in Court an election contest between him and one of the petitioners, or that one of the petitioners was moved to file the petition by malice and ill-will, and that the petition was filed for the purpose of embarrassing the respondent in the conduct of his office?

1. The writ of *mandamus* is an extraordinary remedy, and is never to be resorted to except where the petitioner or relator has a clear legal right to the performance of a particular act or duty by the respondent, and where the law affords no other adequate remedy. In *High on Extraordinary*

Md.]

Opinion of the Court.

Legal Rem., section 10 (2nd ed.), it is said: "The test to be applied, therefore, in determining upon the right to relief by *mandamus*, is to inquire whether the party aggrieved has a clean legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, and who find themselves without any appropriate legal remedy." Or as stated by Mr. Poe: "In order to justify the intervention of the Court and the issuing of this writ, there must be a specific legal right, as well as the want of a specific and adequate legal remedy, and it must be necessary for the purpose of compelling the performance of an act which has either been refused or where circumstances sufficiently indicate an intention to refuse it. It is, accordingly, a proceeding at law, where the purpose of the applicant is not to recover damages for a wrong done, nor to enjoin a party from committing a threatened wrong, but to compel the performance of a positive act, in cases where such remedy is alone adequate to meet the justice of the particular case." 2 *Poe's P. & P.*, sec. 709 (3rd ed.); see also *Brown v. Bragunier*, 79 Md. 234. The distinction between a writ of *mandamus* and a writ of injunction is that the office of the former is to compel the performance of an act, while the latter is a restraining or preventive remedy. This distinction is clearly illustrated and defined in the case of *Legg v. Annapolis*, 42 Md. 203. In that case the Mayor, Counsellor and Aldermen of the City of Annapolis filed a petition against James Legg and others, alleging that in the exercise of the powers conferred upon them they had appointed a police force which was then in the discharge of its duties; that the Governor had appointed the appellants "under the title of The Board of Police Commissioners of Annapolis City," claiming the right to do so under a law which had never been passed or approved as required by the Constitution, and praying for a writ of *mandamus* commanding the appellants "to surcease and desist from exercising, or assuming to exercise, in any manner, any power or authority or

jurisdiction under said pretended Act" and further commanding them to abstain from interfering, etc., with the police department established by the petitioners. Judge ALVEY, in discussing the question whether *mandamus* was the proper remedy, said: "This is the usual prayer for an injunction, in a bill in equity, to restrain an unlawful interference with rights; but we are not aware of any precedent for the use of the writ of *mandamus* to accomplish such a purpose. *Mandamus* is a writ commanding the performance of some act or duty, therein specified, in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved or injured. *Reg. v. Bishop of Chichester*, 2 El. & El. 209. But as simply a preventive remedy it has never been used, so far as we have been able to discover. The nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Its use is therefore confined to those occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." In the case at bar the prayer of the petitioner is for a writ commanding the appellant to vacate the office of city councilman, etc., and is like the prayer in *Triesler v. Wilson*, 89 Md. 176. So far, then, as the nature of the relief sought is concerned, requiring, as it does, the performance of an act, the writ of *mandamus* is clearly the appropriate remedy, and, in considering the first question presented by the record, it only remains to be determined whether there is another adequate remedy.

It is said in 23 *Am. & Eng. Ency. of Law*, 630 (2nd ed.), upon authority of the long list of English and American cases cited in the note, that "At common law, and the absence of statutes changing the rule and providing other remedies, *quo warranto*, or the statutory substitute therefor, is the appropriate and exclusive remedy to try the title to a public office, and to oust a usurper." In such cases, except where

Md.]

Opinion of the Court.

otherwise provided by statute, the sole issue tried is the respondent's title to the office, and the relator's or petitioner's title is not involved, further than is necessary to show a sufficient interest to maintain the proceedings, and cannot be determined. If the proceedings are instituted by one claiming the office, the only result accomplished is the ouster of the respondent, and the petitioner must then resort to a *mandamus* to effectively establish his right to the office." 23 *Am. & Eng. Ency. of Law*, 336 (2nd ed.). That such is the office and scope of *quo warranto* proceedings was distinctly recognized in *Harwood v. Marshall*, 9 Md. 83.

In this State, however, the rule is that the title of the respondent to an office may be tried in a *mandamus* proceeding where the petitioner claims title to the office, and is seeking not only to oust the respondent but to obtain possession of the office. *Harwood v. Marshall*, *supra*; *Triesler v. Wilson*, *supra*. In the latter case JUDGE PEARCE said: "The petitioners here seek not only the removal of the respondents, but the possession of their offices; and since the decision in *Harwood v. Marshall*, 9 Md. 99, it is settled that *mandamus* is the only proceeding in which the judgment could remove the occupant and install the petitioners." See also 19 *Am. & Eng. Ency. of Law* (2nd ed.), pages 767-769. In a note to 9 *Ann. Ch. 20 Alex. Brit. St.*, in force in Maryland, 695, Mr. Alexander says that it is the settled municipal law in England, "that if a man is *bona fide* in office, his title is not to be tried by *mandamus*, but by *quo warranto*. *Quo warranto*, therefore, in that country, is the proper proceeding to test the title of a party who has been elected, while *mandamus* is the proper remedy to enforce an election or admission into a vacant office. But in Maryland we have no proceeding by *quo warranto*, and *mandamus* is indifferently used for the one or the other object." And in the case of *Hawkins v. State*, 81 Md. 314, JUDGE FOWLER disposes of the contention that *Harwood v. Marshall* is authority for the proposition that *quo warranto* is the proper remedy in this

State to remove one from an office he is illegally holding, as follows: "In the case of *Harwood v. Marshall*, 9 Md. 99, it was held that *mandamus* was the appropriate remedy for a party who claims title to an office, and asks for the removal of the occupant, and it being objected that *mandamus* did not lie because there was another legal remedy, to wit, *quo warranto*, the Court, assuming that it was an available remedy in such a case in Maryland, said that it was neither specific, nor was it adequate to the object in view in that case. We do not understand the Court to say that *quo warranto*, or an information of that nature had ever been resorted to in Maryland to remove one from a public office which he was illegally holding, for such is not the fact, as we have seen. All that was said by the Court in that case, in this connection, was for the purpose of meeting the suggestion that *quo warranto* was a legal remedy, and that, therefore, *mandamus* would not lie. We think a conclusive answer to this suggestion would have been that the proceeding suggested in lieu of *mandamus* had never been authorized by the Legislature to be used in such a case in Maryland." It seems, therefore, that *mandamus* is not only the appropriate remedy, but that, in this State, it is the only remedy by which one may be removed from an office to which he is not legally entitled. Learned counsel for the appellant, adopting the view announced in *Kean v. Rizer*, 90 Md. 507, that if the appellant was disqualified his election was void, and relying upon the provisions of section 105 of the Charter, requiring the Mayor and City Council to fill vacancies "in the office of Mayor or any Councilman," contend that the petition should have been filed against the Mayor and City Council to compel them to fill the vacancy. But assuming, without so deciding, that the Court could in such a proceeding determine that a vacancy exists and order the Mayor and City Council to fill it, it could not give a judgment of ouster against the appellant. The relief here sought is the removal of the appellant from the office, and the appellees cannot be

Md.]

Opinion of the Court.

denied the writ of *mandamus* to compel him to vacate the office on the ground that there is another remedy unless that remedy is specific and adequate. If, as contended by counsel for the appellant, *mandamus* cannot be resorted to to oust the appellant, there is no force in the suggestion that he should be made a party to proceedings against the Mayor and City Council. On the other hand, if *mandamus* is the appropriate proceeding to remove the appellant, we see no reason for proceeding against the Mayor and City Council, who will, we must assume, proceed to discharge their duty as soon as the appellant is removed.

2. Without stopping to discuss or consider the many reasons that might be assigned in support of the right of a citizen and taxpayer of a municipal corporation to the proper proceeding to remove a municipal officer who was not legally elected, we think the second question presented by the record is put at rest by the decision in *Pumphrey v. Baltimore*, 47 Md. 145. In that case the appellant filed a petition for a *mandamus* against the Mayor and City Council of Baltimore to compel the City "to take charge and possession of the bridge over Gwynn's Falls" as required by the Act of 1876, and CHIEF JUDGE BARTOL, in deciding the question we are now considering, said: "The position maintained by the appellee is, that the duty imposed is of a public nature, which can be enforced only by a proceeding in the name of the State instituted by the proper officer, the Attorney-General, and that a private person has no standing in Court, or any right to sue out the writ of *mandamus*. In this case the petitioner sets out the particular facts and circumstances which are supposed to show the special and particular manner in which the appellant is aggrieved, by the appellee's failure to perform the duty imposed by the Act of 1876."

"We deem it unnecessary to go into an examination of that part of the petition, because we are of opinion that to entitle the appellant to the remedy here sought, it is not in-

cumbent on him to show any personal interest in the matter different from that of any other citizen."

"We are aware that there is some conflict in the decisions on this question, but after examining the cases, we concur in what has been said by JUDGE STRONG, speaking for the Supreme Court in *R. R. Co. v. Hall*, 91 U. S. 355, that 'there is a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus*, to enforce a public duty, not due to the government as such, without the intervention of the government law officer.'"

The same view is expressed in *High on Ext. Legal Rem.*, sec. 431 (2nd ed.), and in 23 *Am. & Eng. Ency. of Law*, 618 (2nd ed.), it is said, referring to *quo warranto* proceedings: "Any citizen and taxpayer of a municipal corporation may maintain the proceeding to try the title to an office under the municipality and to oust an unlawful incumbent. This has been held in regard to the office of alderman or member of the common council or municipal assembly."

Counsel for the appellant rely upon *Rizer's case* as announcing a contrary view. We do not so understand the decision in that case. The Court was construing the provisions of sections 52 and 58 of the Charter of Cumberland, and held that the disqualifications provided by section 58 were disqualifications arising after an election, and that the *special proceeding* authorized by that section were intended to apply only to cases of disqualification under that section. The question we are here considering, does not appear to have been discussed by counsel or considered by the Court in that case.

3. This brings us to the third and the more important question. Counsel for the appellant, in their carefully prepared brief, have cited many cases holding that where the words of the statute or constitution are, "no person shall be eligible to the office," or "no person shall hold the office," the qualifications relate to the time of qualifying and not to the time of

Md.]

Opinion of the Court.

election. If the Charter of Cumberland simply provided that each councilman must be the owner of property to the value of \$500.00, "the taxes on which shall not be in arrears," or that no one shall be eligible to the office of city councilman unless he owns property to the value of \$500.00, "the taxes on which shall not be in arrears," the authorities referred to would be justly entitled to great weight. Upon the same principle, if the Charter provided that each councilman shall be thirty years of age, the cases cited would support the view that it meant that he must be thirty years of age at the time he qualified, but no such contention could be made if the statute, instead of simply providing that a councilman shall be thirty years of age, said he shall be thirty years of age *at the time of his election*. Section 100 of the Charter is as follows: "The Mayor shall be not less than thirty years of age, and each of the said four councilmen shall be not less than twenty-five years of age, at the time of their election; they shall each of them be citizens of the United States, and for five years immediately preceding their election, residents of the City of Cumberland. The Mayor shall be the *bona fide* owner of property to the value of not less than one thousand dollars (\$1,000), and assessed for the same on the tax books of the said city at the time of his election and for two years next prior thereto, the taxes on which shall not be in arrears; each councilman shall be the *bona fide* owner of property to the value of five hundred dollars (\$500), and assessed for the same on the tax books of the said city at the time of their election and for two years next prior thereto, the taxes on which shall not be in arrears." Here we have an age, residence and property qualification for the Mayor and City Councilmen. It is clear that the age and residence qualifications relate to the time of the election, and it is not denied that a councilman must, at the time of his election, be the owner of property to the value of five hundred dollars. But the statute does not stop there. It requires that he shall be the *bona fide* owner of the property; that he shall be as-

sessed for the same at the time of the election and for two years prior thereto, and that the taxes thereon shall not be in arrear. These provisions of section 100 are dealing with a property qualification at the time of the election. The words "on which" necessarily refer to the property required to be owned at the time of the election, as no other property is mentioned, and for the same reason the words "shall not be in arrears," must refer to the only time mentioned in the preceding portion of the paragraph. The natural meaning of the words "the taxes on which shall not be in arrears," in the connection in which they are used, is that the taxes shall not be in arrear at the time of the election. The property, and the only property, referred to in the statute is the property he is required to own at the time of his election, and the only time mentioned is the time of the election, and it would be giving the language used a meaning entirely foreign to the subject with which the section is dealing, to wit, a property qualification at the time of the election, and one not warranted by anything in its provisions, to hold that it refers to some other property and to a different time. This construction is in harmony with the other qualifications provided by section 100, all of which relate to the time of the election, and which clearly indicate that the framers of the Charter did not have any other time in mind.

Section 52 of the old Charter provided that, "Each and every member of the City Council shall be the *bona fide* owner, in his own right, of property to the amount in value of five hundred dollars, and assessed for the same on the books of the said city at the time of his election and for the year next prior thereto, the taxes on which shall not be in arrears," and in *Rizer's case* this Court, referring to sections 52 and 58 of that Charter, said: "The statute apparently deals with two classes of disqualifications—one in which the disqualification of a candidate occurs prior to an election and the other a disqualification during the time or term for which one is elected." The section which the Court in that case

Md.]

Opinion of the Court.

referred to as providing the qualifications of a candidate prior to an election is section 52, which contains practically the same provisions in regard to the property qualifications as is contained in section 100 of the present Charter. We think the meaning of the statute is that a councilman must, at the time of his election, be the owner of property of the value mentioned, on which the taxes are not in arrear, and that if the taxes are in arrear at the time of the election, he does not possess the qualifications required by the Charter.

4. The answer admits that the taxes were in arrear on the day of the election, and for several days thereafter, but the appellant insists that his effort and readiness to pay them at three o'clock in the afternoon of the day of the election, relieved him of the disqualification. Granting that the matters and facts set up in the answer are equivalent to payment of the taxes at three o'clock in the afternoon of election day, the question presented is, would payment at that time be sufficient? The appellant relies mainly upon the case of *State v. Berkeley*, 140 Mo. 184. In that case the law provided that "no person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes," and the Court held that payment of his taxes at nine o'clock in the morning of election day rendered the candidate eligible to the office of City Attorney. This case is undoubtedly in point, but the case of *Hatcheson v. Tilden et al.*, 4 H. & McH. 279, holds just the opposite. In the latter case the Court was dealing with the provisions of the Constitution of 1776, which provided: "No person to be eligible to the office of sheriff for a county but an inhabitant of said county, above the age of twenty-one years, and having real and personal property in the State above the value of one thousand pounds current money; the justices aforesaid shall examine the ballots, and the two candidates properly qualified, having in each county the majority of legal ballots, shall be declared duly elected for the office of sheriff for such county, and returned to the governor and council, with a certificate of the

number of ballots for each of them." Suit was brought against the judges of the election, and the declaration stated "that the plaintiff was a candidate for the sheriff's office, and had the necessary qualifications according to law; that he had a majority of legal votes. Nevertheless the defendants, etc., refused to return him as sheriff elect," etc. "It appeared on the trial of the cause, that the plaintiff had 453 votes, Jones 443, and Hall 270. That the plaintiff received the amount of real and personal property required by the Constitution. on the third day of the election, and not before. That the two other candidates had acquired it previous to the election. The defendants made a special return on the 8th of November, 1794; but the Governor and Council refused to receive the return, and sent it back as informal, declaring that the defendants were the sole and exclusive judges of the necessary qualifications. Upon which a second return was made, in which Jones and Hall were declared duly elected for the office of the sheriff of the county of Kent." CHASE, CH., J., in disposing of the case, said: "The proper qualifications required by the Constitution are, that the candidate shall, at the time he is voted for, be an inhabitant of the county, above twenty-one years of age, and have real and personal property within the State above the value of 1,000 pounds.* * * All votes given for a candidate, not having such qualifications, are to be thrown away and rejected as having no force or operation in law. The plaintiff can only be entitled to such votes as were given after he received the necessary qualifications, all votes in his favor previous being illegal and void."

And in *Rizer's case* the intimation of the Court is that the qualifications provided by section 52 were qualifications of a candidate "prior to an election." The question here, however, as in other cases, involves the construction of the law under which the election was held, and we agree with the learned Judge below, that the charter evidences the intention of its framers that only those candidates who possess the required qualifications should be voted for at the election.

Md.]

Opinion of the Court.

Section 100, when construed in connection with section 97, can have no other meaning. What could be the object of requiring the candidates for nomination at the primary election, before their names go on the ballots, to swear that they are qualified to hold the office, except to eliminate from the primary contest those who do not possess the required qualifications, and to thereby secure for the final election candidates having the requisite qualifications? The obvious purpose of these provisions is to secure to the voters or electors the right to vote for those qualified under the charter for the offices for which they are candidates, and it would defeat the object of the law to hold that a candidate may, during the last hour of the election, after nearly all of the votes have been cast, and the majority of the electors have made their selection, remove his disqualifications. We therefore hold, that under the provisions of the charter, payment of his taxes at 3 o'clock in afternoon of election day, would not have removed the disqualification of the appellant.

5. In regard to the defense that the pending election contest between the appellee Hirsch and the appellant is a bar to relief in this case, it is only necessary to say that the appellee Deveemon is not a party to those proceedings, and that he cannot, in that case, obtain the relief here sought. In order that other proceedings may be a sufficient answer to the petitioner's prayer for a *mandamus*, it must appear that the *petitioner* can obtain full and adequate relief in such proceedings, and it is not sufficient that in a suit pending between *one* of the petitioners and the respondent, involving different issues, the judgment may indirectly and ultimately bring about the same result sought to be accomplished by the writ.

The further defense that one of the petitioners was induced to file the petition by malice and ill-will, and that the petition was filed for the purpose of embarrassing the appellant in the conduct of his office, is not a sufficient answer to the petition in this case. The writ is issued in the sound dis-

cretion of the Court, and in a case involving only private interests, the Court would no doubt refuse to lend its aid in furtherance of a malicious purpose and where no substantial good could be accomplished. But in this case the writ is sought to compel the performance of a duty to the public, and not to enforce a private right, and relief should not be denied because one of the petitioners was prompted to file the petition by personal ill-will.

Finding no error in the rulings of the Court, the order must be affirmed.

Order affirmed with costs.

ROGER W. CULL ET AL. vs. JOHN B. A. WHELTLE ET AL., THE BOARD OF POLICE COMMISSIONERS OF BALTIMORE CITY.

Constitutional Law—Power of Governor to Suspend Civil Officers Pending Trial of Charges Against Them—Power of Governor to Make Temporary Appointment in Place of Officer Suspended.

The Act of 1900, Chap. 15, authorizes the Governor to appoint, by and with the advice and consent of the Senate, three persons to constitute the Board of Police Commissioners for Baltimore City, who shall hold office for the term of two years. The Constitution, Art. 2, sec. 15, provides: "The Governor may suspend or arrest any military officer of the State for disobedience of orders or other military offense, and may remove him in pursuance of the sentence of a court-martial; and may remove for incompetency or misconduct all civil officers who receive appointment from the Executive for a term of years." No other power of removal is given to the Governor by statute or by the Constitution, and no express

Md.]

Argument of Counsel.

power to suspend civil officers. The Constitution of 1776 did authorize the Governor to suspend, as well as to remove, civil officers, but the power to suspend was omitted from the Constitution of 1851, and the present Constitution. *Held*, that the Governor has no express power to suspend the Police Commissioners appointed by him with the consent of the Senate, pending the trial of charges against them of incompetency and misconduct, and that no such power can be implied from the existence of the power to remove for cause after trial.

Held, further, that since, under Constitution, Art. 2, sec. 11, the Governor has the power to appoint to the office of Police Commissioner, during the recess of the Senate only in case of a vacancy occurring in the office, and since the suspension of such officer does not create a vacancy, the Governor has no implied power to make a temporary appointment to the office, pending the investigation of charges against a Commissioner.

Decided November 30th, 1910.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Isaac Lobe Straus, Attorney General, Isidor Rayner and Randolph Barton (with whom was *Wm. Pinkney Whyte, Jr.*, on the brief), for the appellants.

1. All the authorities, including the Courts and the text writers, unanimously agree, without a single exception or the slightest spark of dissent anywhere, that the right to remove for cause after hearing includes as an incidental and auxiliary power the right temporarily to suspend pending the hearing and decision of the charges. All the cases upon this

subject are one way, that is, in favor of such power of suspension.

The power here under consideration, which is claimed on behalf of the Governor of the State, is the power temporarily to suspend, pending charges, peculiar, incidental and appropriate to the power to remove for such charges, if they are found to be true. It involves merely a limited suspension while the charges are pending, as an auxiliary and concomitant to the power to remove for the causes named. That is the power which is under consideration. With respect to the existence of such an implied incidental and auxiliary power attached to and inherent in the power to remove for cause, all the authorities, without a breath of dissent anywhere, are united and agreed. And furthermore in support of that particular power, it is submitted that every principle of law, of public policy and of reason are also united.

The power of suspension, which is not before the Court, with which we have not the slightest concern in this case, and from confusion with which it is important to keep free and clear, is a power to suspend, not at all auxiliary or incidental to the power of removal for cause, not a temporary suspension pending charges, but an indefinite suspension, equivalent and tantamount in effect to removal itself. This is a different thing altogether from the power herein involved. No such power is claimed or pretended to exist in the Governor. We have nothing to do with it in this case.

In the Editorial Note to the case of *Griner v. Thomas*, 16 American and English Annotated Cases, pages 946-7, the particular subject here under consideration is discussed and the authorities are declared to be unanimously as above stated.

In 17 *A. & E. Enc. of Pleading and Practice*, page 222, title Public Officers, sub-title Suspension Pending Trial, it is said: "The power of removal includes the power of suspension; therefore after the preferment of charges and pending a trial thereon, if the case is one wherein a conviction

Md.]

Argument of Counsel.

would involve a dismissal of the accused officer and warrant his removal, it is wholly proper to suspend the accused pending the investigation."

In 29 *Cyc.*, page 1405, title Officers, sub-title Suspension, it is said: "Where no express power to suspend has been granted the Courts do not recognize that the power is included within the arbitrary power to remove, if the exercise of the power to suspend will produce an interregnum in office. The needs of discipline in such a case may be sufficiently subserved by the exercise of the power of removal and do not require the recognition of a power to suspend. But where the power of removal is limited to cause the power to suspend, made use of as a disciplinary power pending charges, is regarded as included within the power of removal. See also *Dillon, Mu. Corp.*, section 248; 23 *A. & E. Ency.*, 451; 2 *Ibid.*, 843; 5 *Supplement, Ibid.*, 1553; *State ex rel. Douglas v. Megaarden*, 85 Minn. 44.

In *State v. Peterson*, 50 Minn. Reports, 239, it was explicitly held that the power to remove includes the power of temporary suspension pending the trial of the officer.

The case of *State of Missouri ex rel. J. W. Campbell, appellant, v. Police Commissioners et al., Respondents*, June 17, 1884, 16 Missouri Appeal Repts., 48-51, is to the same effect.

In *Fields v. State* (8 Tenn.), Martin and Yerger, 176-177, it is explicitly said: "The Court having power to remove had power to suspend, which as certainly follows, as that the whole includes all the parts." In *Metsker v. Neally*, 25 Pac. Repr. 206 (41 Kansas, 123), the Court said: "We can readily believe the greater power to remove includes the lesser power to suspend." In *U. S. v. Murray*, 101 U. S. 536, it was held by the Supreme Court that the Secretary of the Treasury may put an employe on furlough without pay at any time if the exigencies of the service require it. See also *State ex rel. Brison v. Lingo*, 26 Mo. 498; *Shannon v. Portsmouth*, 54 N. H. 183; *Maben v. Rosser*, 103 Pac. Rep. 674;

Rice v. Minneapolis, 105 Minn. 246; *Wertz v. U. S.*, 40 Court of Claims, 397; *Howard v. U. S.*, 22 Court of Claims, 305; *Sumpter v. State*, 81 Ark. 60; *State v. Board of Police Commissioners*, 170 Indiana, 137.

The cases of *Gregory v. The Mayor*, 113 N. Y. 416, and of *Emmitt v. The Mayor of New York*, 128 N. Y. 117, and of *State v. Jersey City*, 27 N. J. L. 536, and *United States v. Wickersham*, 201 U. S. 390, and the statements in the text of *Throop on Public Officers*, section 404, and of *Meacham on Public Officers*, section 453, all deal with an entirely different right of suspension than the right here involved.

There are two fundamental and radical differences between the right of suspension with which those authorities deal and the right of suspension under consideration in this case.

The authorities above mentioned deal with an arbitrary right of suspension and also an indefinite suspension.

The nature and purpose of that sort of suspension and the principles of law applicable to it are wholly distinct and different from the nature and object and of the principles of law applicable to the limited and temporary suspension pending charges as an incident to the power to remove for cause, which is here in question.

2. The settled maxims of the law and rules of constitutional and statutory construction also support the power of temporary suspension here under consideration.

3. The reason and policy of the law, the necessities of administration and the convenience and protection of the public favor and enforce the existence of such power.

"The suspension of an officer pending his trial for misconduct, so far as to tie his hands for the time being, seems to be universally accepted as a fair, salutary and often necessary incident to the situation. His retention at such a time of all the advantages and opportunities afforded by official position may enable and encourage him, not only to persist in the rebellious practices complained of, but also to seriously embarrass his triers in their approaches to the ends of jus-

Md.]

Argument of Counsel.

tice." *State v. Police Commissioners*, 16 Mo. App. 50, approved and adopted in *State v. Peterson*, 50 Minn. 244; also in *State v. Megardden*, 85 Minn. 41, and in *Thomas v. Griver*, 101 Texas, 38.

4. The language of Article 2, section 5 of the State Constitution is to be construed as clearly including the power temporarily to suspending charges.

It was absolutely necessary to confer the right of suspension in the case of military officers, because the Governor has the right of removal only upon the sentence of a court-martial. Therefore, not having the right of removal otherwise, it might be claimed that he could not suspend in the case of military officers, unless the Constitution expressly gave it to him. Moreover, it will be noted that the word suspend is used in section 15 of Article II of the Constitution for the purpose of prescribing a distinctively military punishment, just as the word "arrest" is used for the same purpose.

Neither of these punishments of suspensions and arrest, as they are peculiarly known and applied in military matters, are employed in the same way in civil concerns, and no inference therefore can be drawn from the use of word "suspend" in the case of the militia and the absence of the word in the case of civil officers. This is illustrated by the meaning and application ascribed to suspension in relation to military officers by *Dudley on Military Law*, pages 161-2,

In relation to civil officers there was no necessity of giving the right of suspension, because the framers of the Constitution doubtless knew that when the Governor was given the right of removal for cause, he must have the right of suspension *ad interim* pending the charges. If this was not the case the officers during trial by holding on could exercise the most flagrant acts of malfeasance, or by their inability or incompetence to serve throw the community into a state of anarchy. Suppose a civil officer is insane, must the Governor wait until the trial is over before he can act? Suppose he

should be guilty of acts of usurpation and of grave official misconduct? Must the Governor stand by and permit him to remain in office until perhaps his time expires by his postponing and delaying the proceeding of the trial?

Some effort was made during the argument below by the learned counsel for the appellees to draw from the proceedings of the Convention of 1851 an inference against the existence of the Governor's power of temporary suspension pending the disposal of charges of misconduct or incompetence against civil officers.

It is submitted with perfect confidence that the proceedings of that Convention furnish no light whatever upon the point here under consideration. There was nothing done or said in that distinguished body, as far as the published reports of its proceedings and debates disclose, which bears at all upon the question here presented.

5. The provisions of Article II, sections 1, 8 and 9 of the Constitution vesting in the Governor the "Executive Power of the State," requiring him "to enforce the laws" and "to take care that the laws are faithfully executed" taken together with section 15 making it his duty to remove civil officers for misconduct or incompetency, render it clear and certain that the power of temporary suspension must exist in the Governor. This is in accordance with the settled interpretation of the Federal Constitution by all the branches of the United States Government from its foundation to the present time, as well as the interpretation of State Constitutions by the Courts and political departments of the several States.

There is not a word in the Federal Constitution expressly giving to the President the right to remove an officer.

As an incident, under the Constitution, of his right to remove, the President has always exercised the right to suspend. These powers of the President to remove and suspend are derived, according to the prevailing view of those who framed the Constitution, of the Supreme Court of the United

Md.]

Argument of Counsel.

States, of its Attorney-Generals and of the most responsible statesmen in the history of the Nation from the adoption of the Constitution to the present time chiefly from the "executive power" which the Constitution vests in the President and from his power and duty "to take care that the laws are faithfully executed."

Congress has acted upon the same doctrine of implied powers with respect to its legislation upon the subject of the removal and suspension of the "inferior" officers.

The statutes which, with respect to some departments and offices, Congress has passed providing for removals and suspensions, have been passed by that body under its authority—not expressly to pass laws on the subject of removal or suspension of officers, but under its implied incidental and derivative power deduced from the grant to Congress to "by law vest the appointment of such inferior officers as they (Congress) think proper in the President alone, the Courts of law or the heads of departments."

So that from the right to vest the "appointment" of these inferior officers in the President or the Courts or the departments, Congress derives the power to vest in them also the right to remove and the right to suspend, and also the right to make temporary *ad interim* appointments during suspension. In other words, the right given by the Constitution to provide for the appointment of these inferior officers carries with it the right to provide for the removal, the suspension and the temporary designation of persons to occupy the office during the disability of the officer suspended. *Perkins v. U. S.*, 116 U. S. 483.

The analogy between the President of the United States and the Governor of a State with respect to the "executive power" and the duty to take care that the laws are faithfully executed with respect particularly to the public offices of the Government, as well as in other respects, is generally recognized and absolutely settled by the authorities. *Miles v. Bradford*, 22 Md. 174; *Reynolds v. Bussier*, 5 S. & R. 451; VOL. 114

Commonwealth v. Lane, 103 Pa. St. 481; *People, etc., v. Morton*, 156 N. Y. 136, 144-5; *State v. Governor*, 1 Dutch, N. J. 351-2; *People v. Bissell*, 19 Ill. 229; *Mauran v. Smith*, 8 R. I. 192; *State v. Governor*, 25 N. J. 331; *Sutherland v. Governor*, 29 Mich. 320; *Hawkins v. Arkansas*, 1 Arkansas, 585; 14 *Am. & Eng. Encyc. of Law*, page 1097; *Throop, Public Officers*, sections 794-5; *Mechem, Public Officers*, sections 952-4; Bryce "*American Commonwealth*," Vol. I, page 36.

In the debates on the Civil Tenure Act and in the judgments delivered in the Senate sitting as a Court to try the impeachment of President Johnson, the same views were expressed by the leading lawyers of the Senate and of the country of that day. *Reverdy Johnson, Congressional Globe*, Part I, 2nd Session, 39th Congress, page 388; 3 *Impeachment, Johnson*, 56; *Wm. Pitt Fessenden, 3 Impeach., Johnson*, 23; *Lyman Trumbull, 3 Impeach., Johnson*, 325-6. See also *President Johnson's message on the Civil Tenure of Office Act*, which was prepared by *William H. Seward* and *Edwin M. Stanton*.

In John Randolph Tucker's excellent work on the *Constitution of the United States*, Vol. 2 sections 357-362, it is explicitly declared that the President's control over the tenure of offices, including the power of removal and its incidents, is derived from the executive power vested in him and his power "to take care that the laws are faithfully executed."

In *Shurtleff v. The United States*, 169 U. S. 311, it was held, that although Congress had created an office and provided for the removal of the incumbent at any time for inefficiency, neglect of duty or malfeasance in office after notice and hearing, the President nevertheless under the Constitution had full power to remove him for some other cause than those specified in the statute without even giving him notice or an opportunity to defend himself, and that in the event of a removal without notice and hearing, it must be presumed

Md.]

Argument of Counsel.

that the removal was made by the President for some other causes than those assigned in the Statute.

The opinions of the law officers of the Government have been entirely in harmony with the foregoing views. *Parsons v. U. S.*, 167 U. S. 321; *U. S. v. McDaniel*, 7 Pet. 1, 14-15; *Blake v. U. S.*, 103 U. S. 227; *Ex parte Hennen*, 13 Peters. 259; *Morgan v. Nunn*, 84 Fed. 551; *Carr v. Gordon*, 82 Fed. 373; *Taylor v. Kercheval*, 82 Fed. 502-3; *Lane v. Comm.*, 103 Pa. St. 181.

6. The power temporarily to suspend being exercised, the Governor has the power to appoint an *ad interim* board during the period of suspension, pending the charges. The Governor has this power as a necessary incident to his power to remove and suspend temporarily pending the hearing of the charges.

He has the power and must exercise it as a part of the executive power vested in him by the Constitution; also in the discharge of his power and duty to take care that the laws are faithfully executed and of his power and duty to enforce the laws of the State.

7. It is contended on behalf of the appellees that there can be no *ad interim* appointments during the period of suspension because there is no vacancy in the offices created by the suspension. We are not dealing in this case with a constitutional vacancy that is the vacancy referred to by sections 11 to 13 of Article 2 of the Constitution, and therefore the cases of *Somerville v. Smoot*, 59 Md., and the *Watkins Case*, in 2 Md., are not applicable or in point herein.

We are dealing with a status created by the suspension, wherein there is no *de facto* incumbent of the office actually performing its duties. If not a technical and absolute vacancy, the situation presented is practically a temporary vacancy in the office. For all practical purposes it calls for the filling of the office during the limited term of the suspension.

The point raised about the existence or non-existence of a "vacancy" is a mere matter of names. While the officer is suspended there is no one actually in charge of the office or in the exercise of its duties. That is a status or condition calling for an appointment for the temporary execution of the office. Under the suspension there is no one in the office. It makes no difference what the status is called. While the suspension exists it may be said that there is not a technical and absolute vacancy. It is a suspension of the incumbent from the exercise of the duties of the office. He is withdrawn from the office and the office is relieved temporarily of his occupancy of it. For the time being he is not in it and therefore for the time being he is out of it. There is a void there. The office is without a *de facto* incumbent. Whilst that continues its functions must stop, for the very practical and obvious reason that there is no one there to perform them. That is a well-known condition, which sometimes arises from one cause or another in our governmental life of which all the departments of the Government take and have always taken cognizance—the Courts, the Legislature and the executive. It is a condition which must be dealt with and it is dealt with and can be dealt with in only one way, and that is to appoint someone temporarily to carry on the office and execute the law for the maintenance of the Government and for the convenience and protection of the people, whose well-being the laws are intended to subserve.

Upon such considerations in *U. S. v. Farden*, 99 U. S., page 18, the Supreme Court effectually disposed of this exact point.

And many other cases illustrate the same fact and principle. *Attorney-General v. Taggart*, 66 N. H. 363-5; *Sprague v. Brown*, 40 Wis. 618; *Wilson v. N. C.*, 169 U. S. 586; *In re Marshalship*, 20 Fed. 379; *Herndon v. U. S.*, 15 Ct. of Claims, 452-3; *Stuebenville v. Culp*, 38 Ohio State, 23; *Brown v. Duffus*, 66 Iowa, 197-8; *Marr v. Stearns*, 72 Minn. 212-214; *Gordon v. Campbell*, 2 Cali. 135; *Woodworth v.*

Md.]

Argument of Counsel.

Hall, 1 Woodberry and Minot, 390-1; *Farrow v. Bigby*, 4 Woods, U. S. Ct. Ct.; *People v. McKee*, 68 N. C. 437; *State v. Johnson*, 30 Fla. 1; *Advisory Opinions to Governor*, 31 Fla. 1, 3; *People v. Bissell*, 49 Cali. 411; *Cooley Constitutional Limitations*, note, pages 99-100, 7th Edition.

And in *Westburg v. City of Kansas*, 64 Missouri, 504, in a case where there had been a temporary suspension of an officer pending charges against him, the Court said: "The law gives the corporation the right to suspend one and this suspension is generally for some fault of the officer and necessities the employment of another to perform his duties." See also *Howard v. U. S.*, 22 Ct. Cl., page 317; *Wertz v. U. S.*, 40 Ct. Cl. 401.

8. The power of temporary suspension pending charges existing and being exercised, the following Maryland decisions are, it is respectfully submitted, conclusive in favor of the right and duty of the Governor to make the temporary appointments. *Robb v. Carter*, 65 Md. 321; *County Comrs. v. School Comrs.*, 77 Md. 290; *Kroh v. Smoot*, 62 Md. 172; *Marshall v. Harwood*, 5 Md. 423.

9. The Governor, as the proceedings show, having taken jurisdiction over the charges as sufficiently setting forth both incompetency and official misconduct, his discretion, judgment and action in that respect, exercised in the execution of his powers and duties as the executive head of one of the co-ordinate branches of the Government, and with respect to a power and duty specially committed to him by the Constitution, are not subject to review or control by the judicial department, an equal and co-ordinate but not superior branch of the Government.

The Court could not proceed by injunction, mandamus or otherwise to compel the Governor to take jurisdiction and act or to restrain him from taking jurisdiction and acting on the charges preferred, and therefore the Courts cannot in this proceeding accomplish collaterally and indirectly what they could not do directly and immediately. *Miles v. Brad-*

ford, 22 Md. 170; *Worman v. Hagan*, 78 Md. 151; *Martin v. Mott*, 12 Wheat. 19; *Miss. v. Johnson*, 4 Wall. 475; *Keenan v. Perry*, 24 Texas, 259; *Guden's Case*, 171 N. Y. 529; *State v. Ansel*, 76 S. C. 395; 11 A. & E. *Annnd. Cases*, 316; *Opinion to the Governor*, 58 Mo. 372; *State v. Doherty*, 26 La. Annual, 120; *Gaines v. Thompson*, 7 Wall. 347; *Decatur v. Paulding*, 14 Pet. 497; *Keim v. U. S.*, 177 U. S.; *Boynton v. Blaine*, 137 U. S.; *U. S. v. Windom*, 139 U. S. 636; *Dudley v. James*, 83 Fed. Reporter, 349; *Morton*, 156 N. Y.; *Sutherland v. Governor*, 29 Mich., *supra*; *Bates v. Taylor*, 87 Tenn. 319; *People v. Wilcox*, 90 Ill. 196; *Attorney-Genl. v. Brown*, 1 Wis.; *Keim v. U. S.*, 33 Ct. of Claims, 185; *State v. Pol. Commsrs.*, 170 Ind. 133; *Throop Public Officers*, sec. 794; *Meecham Public Officers*, sec. 952; *O'Neil v. Fire Commsrs.*, 59 Md. 283; *Green v. Purnell*, 12 Md. 329; *In re Moyer*, 85 Pac. Rep. 192 (35 Col. 164-5); *Luther v. Borden*, 7 Howard, 1; *Ex parte Moore*, 64 N. C. 802; *State v. Fair*, 76 Pac. Repr. 732 (35 Wash. St. 127); *People v. Byrd*, 98 Ga. 691; *U. S. ex rel. Edwards v. Root, Sec'y of War*, 22 Appeal Cases, D. C. 419, by Alvey, C. J.; *U. S. v. Hitchcock*, 190 U. S. 316.

Edgar H. Gans and *Wm. S. Bryan, Jr.* (with whom were *Chas. F. Harley* and *Jos. R. Gunther* on the brief), for the appellees.

In section 15 of Article 2 of the Constitution the whole subject of suspension and removal was provided for. This section was not intended to give power not possessed by the executive before. It is taken *verbatim* from the Constitution of 1851, and prior to 1851, as we shall see, the Governor had an almost unlimited power of suspension and removal. The section was intended to limit and restrain the power of the Governor, and to state just how far the Governor could go. He has therefore no powers of suspension and removal in the classes of officers specified than those contained in this section. It is observed that the section deals with (a) military

Md.]

Argument of Counsel.

officers, and (b) civil officers who received appointment from the executive for a term of years. As to (a) military officers the power of suspension is expressly given as well as the power of removal; as to (b) "civil officers who received appointment from the executive for a term of years," the only power given is the power of removal and that is limited to removal for incompetency and misconduct, which means after a fair and impartial trial.

When the section 15 of Article 2, is placing restraints upon the power of the Governor; when both powers of suspension and removal are being considered in the same section; when the power of suspension is given to one class of officers in express terms and not given to the other class; when the power of removal in both classes is expressly limited, how can it be argued that the arbitrary power of suspension of any kind can be implied or inferred? No inference or implication is permissible when it is evident that the Constitution is expressly treating, as to these classes of officers, of the whole subject of removal and suspension.

This conclusion is strengthened by what took place in the convention which framed the Constitution of 1851. This throws additional light upon the situation and shows that in 1851 the powers held by the Governor prior to that time were being curtailed, and that section 16 of Article 2 in the Constitution of 1851, copied verbatim as section 15, Article 2 of the Constitution of 1867, was not a remedial section to be extended by implication, but a restrictive section to be construed in the line of a curtailment instead of an extension of executive powers.

The appellants would not contend that the Governor had the right of temporary suspension of the Board of Police Commissioners, if the effect was to leave the police department without a head. Their course of argument is as follows: First they imply the power of temporary suspension as a reasonable and convenient means of more effectively trying the removal charges. Then, inasmuch as a suspension pending

charges would leave the office with no one to perform its duties, they further imply a right of temporary appointment, pending the charges, of a new board—implication breeding further implication—this double implication is absolutely necessary to their case, for the power of temporary suspension and the power of temporary appointment occasioned by the suspension, are correlatives and the former would not exist without the latter. This is the use the appellants make of the admitted principle that while the office exists there should be some one to continuously perform its duties.

The appellees, however, make a far different use of this principle. If the power to temporarily suspend does not exist unless the Governor has the correlative right to temporarily appoint a new board, the appellees proceed to investigate the independent question whether the Governor has the right to make the temporary appointment. If the Governor has under the Constitution and the decisions of this Court no power to make the appointment, temporary or otherwise, then it is clear to a demonstration that the power to temporarily suspend does not exist; for this would leave the office with no one to perform its functions, which both sides agree is a legally impossible situation.

Let us proceed to investigate the independent question whether the Governor during the recess of the Senate, has the power to make the temporary appointment as claimed. At the outset it is necessary to point out that suspension is not the same thing as a removal. One prevents the officer from exercising the functions of his office, and likewise deprives him of his salary. The other creates a vacancy which authorizes the filling of the office by the appointing power. The authorities on this point are unanimous.

In *Gregory v. Mayor*, 113 N. Y. 416 (see also 3rd L. R. A., page 854), JUDGE PECKHAM, afterwards Associate Justice of the Supreme Court of the United States, says: "The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once.

Md.]

Argument of Counsel.

and if the duties are such as to demand it, it should be thus filled. The power to suspend causes no vacancy and gives no occasion for the exercise of the power to fill one. The result is that there may be an office, an officer and no vacancy, and yet none to discharge the duties of the office. By suspension the officer is prevented from discharging any duties, and yet there is no power to appoint anyone else to the office because there is no vacancy."

In *State v. Jersey City*, 25 N. J. L. 563, the Court held that expulsion creates a vacancy that can be supplied by a new election. Suspension from the duties of the office creates no vacancy. The seat is filled, but the occupant is silenced.

In *Remley v. Matthews*, 84 Ark. 598, the Court says: "He did not cease to be sheriff because of his suspension pending the indictments against him. His suspension from the office of sheriff only disabled him from discharging the duties of the office and did not take away the office itself. Only removal from the office could do that."

In the case of *Sumpter v. State*, 81 Ark. 60, the Court says: "There is a distinction between a suspension and a removal from office. In the case of suspension the defendant still remains an officer and there is no vacancy, but as a matter of public policy, he is prevented from exercising the duties of the office while an indictment is pending against him."

So in the case of *Griner v. Thomas*, 114 S. W. 1058 (19 Tex. C. T. R.), the Court says: "Still a suspension is in no proper sense the same thing as a removal. We are not at liberty, by construction or otherwise, to hold that the provisions of the constitution with regard to removal apply equally to suspension from office."

In *Ex parte Hennon*, 13 Peters, 225, the Supreme Court of the United States says, on page 261: "There could not be two clerks at the same time. The officers would be inconsistent with each other, and could not stand together."

If, therefore, the temporary suspension would be allowed to go into effect, it is quite certain that no vacancy in the office would be created. Now it is also clear from the Constitution and the decisions of this Court that the Governor has no power of appointment of any kind during the recess of the Senate except to fill a vacancy. *Smoot v. Somerville*, 59 Md. 84. See also to the same effect *Watkins v. Watkins*, 2 Md. 355-6.

It appears then from the Constitution and the decisions of this Court that no appointments can be made by the Governor during the recess of the Senate unless in case of absolute necessity, and that this absolute necessity means the existence of a vacancy. The appellants contend that a right of temporary appointment follows from the implied right of suspension which is not founded on any necessity at all, but at most can only be claimed to be a reasonable and convenient implication. Since there is no power in the Governor to appoint there can be no power to suspend for this would leave the office without any one to perform its functions.

In *Kroh v. Smoot*, 62 Md. 175, this Court has held that where the Governor appoints during the recess of the Senate the Constitution fixes a precise term of office for the new appointee, to wit, from the time of the appointment to the end of the Legislature next ensuing the appointment. The fallacy in the appellants' case is therefore also shown by the form of the commission issued to the appellants in this case, which does not run until the end of the next session of the Legislature, but only until the termination of the trial of the charges against the Commissioners. The trouble with the appellants' case is that every part of it antagonizes the Constitution of the State and the decisions of this Court.

Further light is shed upon this question by the policy of our legislation with respect to suspensions of public officers. With reference to the higher and more important offices there has never been any legislation concerning suspensions. It has been recognized that under the Constitution they were

Md.]

Argument of Counsel.

intended to be independent in their action and not under the control of the Governor in any way in the performance of their duties. He appoints them, by and with the consent of the Senate; or, in the recess of the Senate, he fills a vacancy. There his power stops. He has nothing to do with the detailed administration of the duties of the respective offices. He cannot set up his judgment against the judgment of the officer who is responsible for the due performance of the duties of that office. If he would undertake to interfere he would be an intermeddler. When, however, an officer becomes incompetent or is guilty of misconduct in office, then the Governor's power again comes into play, and for certain causes he may remove after the officer is convicted on a fair and impartial trial. But between the appointment and the removal the officer has independent charge of his office. This policy has always been recognized by the Legislature.

But there are minor offices, with respect to which a power of detailed supervision is desirable, and as a sanction for this supervision suspension from the functions of an office for a limited time is often found effective. Even as to those it has been thought necessary to provide for them by definite legislation whereby the power of suspension is limited and regulated.

Thus, it is definitely provided by statute for the suspension of: policemen (*Balto. City Code*, sec. 749); persons licensed to measure or inspect oysters (1906, Ch. 188); street cleaners (*City Code*, Art. 36, sec. 16); officers of the State fishery force (*Code*, Art. 72, sec. 36); licensed pilots (*Code*, 74, sec. 15); county school superintendents (*Code*, Art. 77, sec. 11); and other instances.

For the reasons already indicated the numerous references of the Attorney-General to the practice under the Federal Government have no application. There is not a line in the Constitution of the United States respecting removals from office except by impeachment. Hence the whole power of removal exercised by the President was derived from the ap-

pointing power. Many of the best lawyers in the country have denied that the power of the President to remove public Federal officers without the assent of the Senate is properly deducible from the appointing power, but all have agreed that owing to the history of the exercise of the power, it could not at this late day be questioned. This history is given by the Supreme Court of the United States in the case of *Parsons v. U. S.*, 167 U. S. 324.

Nor can decisions in other States, having different constitutions and a different policy in relation to the executive power, be of much assistance.

We believe the real philosophy of the situation to be best stated by JUDGE PECKHAM (afterwards Justice in the Supreme Court), in the case of *Gregory v. Mayor*, 113 N. Y. 416, where the Court says: "If it be claimed that the power to suspend also includes the power to fill the place of the officer suspended during such suspension, then there is a second presumed power which flows from the simple power to remove. There is the power to suspend and there is the further power to be implied from it, viz, the power to fill the office with another during such suspension, though there is no vacancy in the office. We do not think either of those last-named powers should be implied in the mere grant of the power to remove. We are not inclined to go so far with the doctrine of implied grants of power because we think the implication is not one which naturally or necessarily arises out of the nature of the main power granted, and its denial in cases like this can work no possible mischief." See also *Emmitt v. Mayor*, 128 N. Y. 117; *Wickersham's Case*, 201 U. S. 390; *State v. Jersey City*, 1 Dutcher, 536, 25 N. J. L. 563; *Leftbridge v. Mayor*, 15 N. Y. Suppl. 562.

The charges filed do not amount on their face to charges of incompetency or official misconduct within the meaning of the Constitution in such a way as to give the Governor jurisdiction to try the appellees.

Md.]

Opinion of the Court.

J. Southgate Lemmon, filed a brief on behalf of *C. Baker Clotworthy*, one of the appellees.

BOYD, C. J., delivered the opinion of the Court.

The appellees were on the 24th day of September, 1910, members of and constituted the Board of Police Commissioners of Baltimore City. On that day the Hon. Isaac Lobe Straus, Attorney-General of Maryland, preferred before the Governor "complaints and charges of incompetency and official misconduct" against them, and the Governor named Wednesday, October 12th, 1910, as the time for a hearing.

On October 8th the Governor notified each of the three that in view of the charges and complaints against him he was suspended as a member of the Board of Police Commissioners of Baltimore City, from that date until the decision and determination of the charges and complaints against him, and ordered him to turn over the possession, property, effects and appurtenances of said office to such person as may be appointed by him to hold and exercise the duties of said office for the indicated period of temporary suspension. A commission was issued on the same day to each of the three appellants by which each was appointed a member of the Board during the period of the pendency of the charges and complaints against the suspended member whose place he was appointed to, "and until the said charges and complaints shall, after inquiry, examination and hearing thereinto and thereof, have been decided and determined."

The appellees having refused to surrender their offices to the appellants, the latter filed a petition for a mandamus. An answer was filed by the defendants (the appellees) to which the petitioners (the appellants) demurred. The demurrer was overruled and, no further proceedings having been taken by the petitioners, an order was passed refusing and finally dismissing the petition, with costs to the defendants. From that order this appeal was taken.

As this is the first time the right of the Governor to suspend an officer, pending proceedings to remove him for cause, has been presented to this Court, or its predecessors, for determination, or, so far as we are aware, has arisen in any of the Courts of this State, the case is one of more than usual importance to the people of the State at large, as well as to the parties immediately concerned. The appellees have urged several grounds for denying the right of the appellants to the writ of mandamus, but we will only consider such as we deem necessary or desirable to be determined on this appeal.

The primary question is: "Had the Governor the power, under the Constitution and laws of this State, to suspend these officers, pending the proceedings to remove them on the charges and complaints of incompetency and misconduct in office?"

That inquiry is made assuming, but not deciding, that the specifications filed do amount to charges of incompetency and misconduct in office, within the meaning of the law under which the appellees were appointed.

A Board of Police Commissioners for Baltimore City has been in existence for fifty years, but the number of members, the method of their appointment, and other provisions have been changed several times. By the Act of 1900, Chapter 15, the Governor was authorized to appoint, by and with the advice and consent of the Senate, three Commissioners for the term of two years and until their respective successors were appointed and qualified—their terms beginning on the first Monday of May next ensuing their appointment. Prior to that time the Commissioners were elected by the General Assembly (the Mayor being *ex officio* a member until 1867), and the Governor had no power to appoint, excepting to fill vacancies during the recess of the Legislature. From 1867 to 1900 the General Assembly, if in session, was authorized to remove the Commissioners for official misconduct, and during the recess of the Legislature the Governor

Md.]

Opinion of the Court.

was empowered to remove them on conviction of any felony before a Court of law, and to appoint successors to such delinquent Commissioners until the next meeting of the Legislature.

By section 740 of Article 4 of the Code of Public Local Laws, as amended by Chapter 15 of the Acts of 1900, which is still in force, it is provided, that "Any of said Commissioners shall be subject to removal by the Governor for official misconduct or incompetency, in the manner provided by law in the case of other civil officers," and section 741 provides that: "In case of the death, resignation, *removal* or disqualification of any Commissioner, the Governor shall appoint a successor for the remainder of the term so vacated, subject to the provisions of the foregoing section, and of the Constitution of the State."

It will be observed that the causes for removal are the same as those in section 15 of Article 2 of the Constitution, and the power to fill vacancies is expressly made subject to the provisions of the Constitution on that subject. We are therefore not called upon to consider, as we have sometimes been, any supposed conflict between the statute and the provisions of the Constitution, but will refer to the latter in our discussion of the case. Section 15 of Article 2 of the Constitution is: "The Governor may *suspend* or arrest any military officer of the State for disobedience of orders or other military offense; and may *remove* him in pursuance of the sentence of a Court Martial; and may *remove* for incompetency or misconduct all civil officers who received appointment from the executive for a term of years."

That language of itself must be admitted to be at least suggestive, for when the same section authorized the Governor to "*suspend* or arrest" a military officer for the causes given, and to *remove* him in pursuance of the sentence of a court-martial, and then, when it deals with civil officers, only authorizes him to "*remove*" them, the maxim "*expressio unius est exclusio alterius*" naturally suggests itself. There

is no other power of removal of these officers expressly given to the Governor, either by the Constitution or by statute, and there is not only no express power of suspending them given him, but a striking contrast is made between his powers in reference to military officers and those concerning civil officers. If it be said that it was necessary for him to have the power to suspend military officers for disobedience of orders or other military offence, why did the framers of the Constitution nevertheless expressly insert that power, and yet omit it in dealing with civil officers, if the power to suspend them be an incident to the power to remove for cause?

But the history of this provision of the Constitution sheds much light on the subject. Article 48 of the Constitution of 1776 provided: "That the Governor, for the time being, with the advice and consent of the Council, may appoint the Chancellor, and all judges and justices, the Attorney-General, Naval officers, officers in the regular land and sea service, officers of the militia, registers of the land office, surveyors, and all other civil officers of government (assessors, constables and overseers of the roads only excepted) and may also *suspend or remove* any civil officer who has not a commission during good behavior; and may *suspend* any militia officer, for one month; and may also *suspend or remove* any regular officer in the land or sea service; and the Governor may *remove or suspend* any militia officer, in pursuance of the judgment of a court-martial." In that Constitution he was thus expressly authorized to *suspend or remove* any civil officer who had not a commission during good behavior.

Then we find in the Debates and Proceedings of the Convention of 1851, that when the Committee on the Executive Department made its report, it recommended, after stating what is now in section 15 as to military officers, that the Governor "may *suspend or remove* any civil officer whose term of office is not placed beyond his control by some other provision of this Constitution." A substitute for that report was offered, including one as follows: "He may remove any

Md.]

Opinion of the Court.

of the civil officers of the government, of his appointment, upon satisfactory evidence of any malfeasance in office, but shall report every such case to the Legislature at the next session thereafter." There was considerable discussion as to the power of the Governor to remove, and although we do not find any special objection made by the speakers to the word "suspend," the fact is that when the Constitution was finally adopted this section was changed to read, "and may *remove* for incompetency or misconduct, all civil officers who receive appointments from the executive for a term not exceeding two years." The express power to *suspend* was thus left out of the Constitution of 1851, and it was likewise omitted in those of 1864 and 1867.

If the framers of those three Constitutions had intended that the Governor should not only have the power to *remove* civil officers, for incompetency or misconduct, but also to *suspend* them, pending proceedings for such removal, it is impossible to understand why they should deliberately have omitted the term "suspend." It is more reasonable to conclude that they did not so intend, as they knew that the power to remove given by section 15 of Article 2 might include officers of as much importance as many of those elected by popular vote. When by the Act of 1900 the Legislature gave the Governor power to appoint the Commissioners, and to remove them for official misconduct or incompetency, it by the next section (741) of the same Act provided, that "In case of the death, resignation, *removal* or disqualification of any Commissioner, the Governor shall appoint a successor for the residue of the term so vacated," but made no provision in case of suspension of a Commissioner, although in section 749 it had expressly provided that "the said Board shall have power to suspend from duty, fine or forfeit the pay of any officer or policeman," and in section 745 had said "the period of appointment in the regular police force shall be four years, unless sooner removed for official misconduct and inefficiency.

of which the said Board of Police Commissioners shall determine."

It cannot be denied by any one familiar with the provisions of the Constitutions of 1776 and 1851 that it was intended by the framers of the latter to limit the powers of the Governor. Under that of 1776 he had almost unlimited power of appointment of officers, while in that of 1851, and in the two later ones, most of the important offices were made elective by the people, and the power of the Governor to remove officers of such importance as the Police Commissioners was generally limited to action after conviction in a Court of law. It is said that the right to suspend pending proceedings to remove is essential to the protection of the public. If that be so, the people of Maryland have been left by the Constitutions of the State in a very helpless condition for many years. Without going back of the present one, it will be seen by an examination of it that the Governor has no power to remove many of the most important officers until conviction in a Court of law, or, in some instances, after action by the Legislature. That statement applies to Judges, Clerks of Courts, Registers of Wills, the Attorney-General, State's Attorneys, Justices of the Peace, Constables, the Mayor of Baltimore and others, and there is no provision in the Constitution for the removal of Sheriffs.

Important as are the duties of those officers, it could not be pretended that if any of them were indicted, even for serious crimes, the Governor could suspend them, prior to conviction, and then only by virtue of the express power conferred upon him. We are aware that with the exception of the Justices of the Peace, the Governor does not appoint the officers above mentioned (beyond filling vacancies in certain cases), but we have referred to them in reply to what we regard an unsound argument, which is to be found in some of the cases in other jurisdictions which hold that the right to suspend, pending proceedings to remove for cause, is essential, and also for the purpose of showing that the right to sus-

Md.]

Opinion of the Court.

pend has not been found to be necessary or desirable in Maryland, even in case of such officers as Sheriffs and Constables, upon whom the peace and good order of the counties in a large measure must depend, or the Clerks and Registers of Wills, some of whom handle large sums of public money.

The Police Commissioners of Baltimore City are officers of great importance. Each one of them gives bond in the penalty of \$10,000 for the faithful discharge of his duties. They have under them very many persons, perhaps not far from a thousand; they can control the sheriff in the preservation of the public peace and quiet, can require him to summon the *posse comitatus* for that purpose; they can even call out the military forces in Baltimore City, and they have unusual and great powers. Their duties are not of a character which can be taken up today and laid aside tomorrow without great detriment to the public. It would be demoralizing to the discipline of the Police Department and injurious to the public welfare, if they could be suspended at the will of the Governor, or other appointing power, and others temporarily put in their places, and we cannot believe that the Legislature or the makers of our Constitutions ever intended that it should be done. It would be difficult for anyone to discharge the duties of Police Commissioner with that fearlessness and independence which the character of the duties peculiarly demands without making enemies, or at least having his motives misunderstood or misconstrued, and if one must be suspended because charges are preferred against him, it would be an easy way for designing people to get rid of him for the time being, for if the Governor must suspend them by reason of pending charges preferred at his instance, surely he should do so when they are preferred by others.

If the people of the State of Maryland, who framed the Constitution through their representatives and then by their votes ratified it, are to be judged by their actions, they have unmistakably declared that it is not their will that those occupying important public offices be deprived of them, mere-

ly because they are *charged* with incompetency or misconduct. It is not in accord with the spirit that has characterized the people of Maryland at least since 1851 to say, that one deemed worthy by the Governor and Senate of Maryland of a high and important office is to be even temporarily deprived of it, before he is convicted by the tribunal which they, through the organic law, or their representatives in the Legislature, have said shall give him a fair and impartial trial. Far better would it be to possibly suffer some occasional inconvenience, or loss to the State by reason of the incompetency or even misconduct of some public official, than to subject one believed to be worthy of election or appointment to the mortification and indignity of being even temporarily removed, merely because charges are preferred against him, for it is useless to suggest that an officer is not seriously injured in both his individual and official capacities by a suspension from office, although he may be eventually acquitted of the charges against him. On his trial he has the opportunity of letting the public, as well as the tribunal before whom he is tried, judge whether he is guilty or innocent, but a suspension on charges—in this case not even under oath—would not only deprive him of his office for the time being, without a hearing, but almost necessarily carry with it some suggestion of guilt before he has an opportunity to vindicate himself. There is no necessity for such procedure, and we are satisfied that our laws do not contemplate it, however it may be regarded in other jurisdictions.

Sections 12, 13 and 14 of Article 41 (Article 42 of Code of 1860) provide the method of procedure before the Governor. In *Harmon v. Harwood*, 58 Md. 1, this Court through CHIEF JUDGE BARTOL said, in speaking of them: "The Code, Article 42, in the sections to which we have referred, carefully prescribes and directs the mode by which the Governor is required to exercise this delicate and important power, by providing for notice to the party complained against, an opportunity for defense, the examination of witnesses and a

Md.]

Opinion of the Court.

full hearing of the case." JUDGE McSHERRY said, in *Miles v. Stevenson*, 80 Md. 358: "It is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of its emoluments and income before its prescribed term has elapsed, except for legal cause, alleged and proved, upon an impartial investigation after due notice." We are aware that both of those cases involved removals, and not merely suspensions, but section 12 of Article 41, provides, that: "Upon complaint made against any civil or military officer who *can be removed or suspended* by the Governor, the Governor may summon before him any witnesses to testify for or against such complaint," and then authorizes the payment of witnesses fees and gives power to the Governor to require their attendance. Section 13 is: "Upon complaints made under the preceding section, the party complained against shall have a copy of the complaint and notice of the time when the Governor will inquire into and examine the same." The complaints "under the preceding section" are those "made against any civil or military officer who can be removed or suspended by the Governor." Clearly then if the appellees are civil officers who can be suspended, they have under those sections the same right to a hearing before being suspended, as they would have before being removed, if the language of the statute is to be followed. Those sections were enacted in 1786, when the Constitution of 1776, which expressly authorized suspensions and removals was still in force, and they were just as applicable to the one as to the other. They clearly did not contemplate either by the Governor before a hearing, and hence if there is an implied power to suspend civil officers, the statute applies, and if there is not, the Legislature may have assumed it could so provide in special cases, and hence let that remain in the Code.

In *Groome v. Quinn*, 43 Md. 572, this Court held that, although under the Constitution and existing laws the Governor had *jurisdiction* to hear and decide the case of a con-

tested election for the office of Attorney-General, yet until the Legislature clothed him with the authority and gave him the means and instrumentalities of exercising it, as it was authorized to do under section 56 of Article 3 of the Constitution, he had no power to examine and decide the questions raised by such contest. CHIEF JUDGE BARTOL said: "It has been argued that these powers are conferred upon the Governor by implication, upon the ground that 'where a general power is conferred, every particular power necessary for its exercise will be implied.' We are not willing to adopt this rule, in the broad and unlimited terms in which it has been stated; nor is it in any sense applicable to the present case * * * But it is clear from the terms of the Constitution that no such powers were intended to be vested in the Governor by implication. By Article 3, section 56, it is provided that 'the General Assembly shall have power to pass all such laws as may be necessary and proper for carrying into execution the powers vested by this Constitution in any department or office of the Government, and the duties imposed on them thereby.'"

JUDGE BARTOL went on to say that many examples might be given to show the necessity for such legislation, but that a single one would suffice. He then referred to the power to remove conferred upon the Governor by section 15 of Article 2, and cited sections 13, 14 and 15 of Article 42 (now 41) of the Code. He said: "It has been argued that the general power of removal for cause, conferred on the Governor by the Constitution, might be exercised by him without the aid of these statutes; but the power thus exercised would be arbitrary, and contrary to the spirit and intent of the Constitution, no officer ought to be convicted of incompetency or misconduct, and deprived of his office without a fair and impartial trial." Can it be said in the face of that decision, and in view of the fact that the power of the Governor to suspend a civil officer was in one Constitution of the State and then omitted in the three others, and moreover that the statute, which was nec-

Md.]

Opinion of the Court.

essary to enable the Governor to exercise the power of removal, provides that when he has power to *suspend or remove*, it can only be done by adopting the method therein prescribed, that the Governor has the *implied* power to suspend without a hearing, pending the proceedings for removal? There can be but one answer to that in our judgment. Possibly the Legislature can authorize it, but it has not done so, and hence we express no opinion as to that.

The appellants argued that inasmuch as the Constitution does give the Governor power to remove for cause, such power included that to suspend, pending the proceedings to remove, and they assert that such is the universal doctrine accepted by other Courts and hence the framers of the Constitution are presumed to have intended to include it. But in the first place, we have pointed out that, whatever may be the rule elsewhere, there is not only nothing to show that it was intended to be adopted here but there is much to establish precisely the contrary—such as deliberately leaving out of the later constitutions the power to suspend which was originally included, inserting provisions such as we have referred to limiting the powers of the Governor and other things we have mentioned above. But beyond all that, even if we concede the claim of the appellants that other Courts have unanimately adopted the view they contend for, they cannot rightfully contend that the framers of the Constitution of 1867—much less of that of 1851, when the change was first made—knew that under the decisions the power to remove for cause included that to temporarily suspend, and hence did not deem it necessary to give the express power to suspend. They could not have been of such opinion by reason of Federal decisions, or action by the President and others connected with the general government, for the simple reason that the United States Constitution does not confer the power to remove, but the right to do so is based on the theory that the power to appoint includes the power to remove. Nor could the framers of our Constitution of 1851, or even the later

ones, have been influenced by the decisions of State Courts, as but few, if any, of those relied on by the appellants had then been rendered. That of *State v. Police Commissioners*, 16 Mo. Ap. 48, which seems to be the one most followed by other cases, was not decided until 1884, and then by a Court which was not one of last resort, although of high standing. Whatever may now be the general trend of the decisions in other States, even if they be admitted to be practically unanimous on the one side, in the absence of some constitutional or statutory barrier—there was no such principle of law so generally recognized by the Courts of this country in 1851 or 1867 as would justify us in assuming that by reason of it the framers of our Constitution intended to incidentally include the right to suspend in the power given to remove for cause, although they had deliberately omitted the power to suspend. Indeed, in one of the latest and strongest cases cited by the appellants (*State v. Megaarden*, 85 Minn. 44) the Court said: "The authorities in respect to the incidental right to suspend pending the hearing are meager and unsatisfactory." In the still later case of *Maben v. Rosser*, 103 Pac. 674, decided in 1909 and cited by the appellants, that Court said: "As between these two rules which appear to be about equally supported by the authorities * * * we feel constrained to adopt," the rule, etc.

In 22 *Am. & Eng. Ency. of L.*, 451, published as late as 1903, it is said: "Though the authorities are meager and unsatisfactory, the rule in several jurisdictions is that the" suspension pending the investigation of charges is not an improper exercise of authority. In some of the cases relied on by the appellants the question was whether a statute passed to authorize a temporary suspension pending proceedings to remove was constitutional, which is altogether another matter, although those cases do adopt the doctrine contended for by the appellants. In this State statutes have been passed authorizing the suspension as well as removal of inferior officers in particular cases, but the Legislature has not seen

Md.]

Opinion of the Court.

fit to give the Governor such power in cases arising under this provision of the Constitution, if it can do so. But without further discussing that subject, or the distinction claimed by the appellants to exist between this case and such as *Gregory v. New York*, 113 N. Y. 416, *Emmitt v. New York*, 128 N. Y. 117, *State v. Jersey City*, 27 N. J. L. 536, and the statements in *Throop on Public Officers*, sec. 404, and *Meachem on Public Officers*, sec. 453, which were cited by the appellees, what we have said is sufficient to show that there was no such consensus of opinion as to the law on this subject, when either of our Constitutions was adopted as to suggest, much less establish, that it was intended to include in this power to remove for cause the power to temporarily suspend, even if we ignore what was said in *Groome v. Guinn* about the effect of section 56 of Article 3 on powers by implication. If the law had been then well established in other jurisdictions, it would be a very violent presumption, in view of the deliberate acts of our constitutional conventions, to conclude that such was the intention, especially when our statutes prescribing the mode of procedure and our decisions are borne in mind.

We will not discuss Federal appointments, as those made by the President cannot be taken as precedents in construing our Constitution and laws. It may have been necessary to give the President such power as he had conferred upon him by Congress, but every one familiar with the history of our country knows how bitterly it was opposed. Possibly those controversies had something to do with the limitations placed upon the Governor of this State in 1851, and since continued. The President of a great country like this could not give up his time to hearing charges against such of the many thousands of officers scattered over our immense territory, as may give offense or may be accused of being incompetent or guilty of misbehavior in office, but the fact is that the sentiment against frequent removals and suspensions of Federal officers has been growing, and has resulted in some Acts of Congress

and orders of the President to prevent it, and the agitation of others. But there can be no reason why the Governor of this State cannot give officers appointed by him, not only a fair and full hearing, but such a speedy one that there can be no necessity for disturbing them in the discharge of their duties before trial.

What we have already said ought to be sufficient to show that in our judgment it was not intended to give the Governor an implied power to suspend, when section 15 of Article 2 gave him the power to remove civil officers for the causes therein named. But there is another convincing reason for not adopting that construction—that is, if the power to suspend was admitted to exist, there is no authority in the Constitution or statute for him to appoint others in the places of those suspended. It cannot be pretended that there is any express power, but it is argued that, as by section 1 of Article 2 of the Constitution the executive power of the State is vested in the Governor, and by section 9 he is required to take care that the laws are faithfully executed, if the power to remove given by section 15 includes the power to suspend temporarily, it is his right and duty to prevent the offices from being unoccupied, and hence he can make the *ad interim* appointments, although not in terms so authorized. Of course it will be observed that that assumes the very important premise, that section 15 does include the power to suspend temporarily, which we do not admit, but if it did, could the Governor make the *ad interim* appointments?

There is no provision or authority for the Governor making an appointment outside of sections 10 and 13 of Article 2, excepting to fill a vacancy, and those two sections refer to the appointments made by the Governor and Senate, and cannot be said to in any way reflect on this question. It was said in *Smoot v. Somerville*, 59 Md. 84, referring to sections 11, 13 and 14 of Article 2: "From the language employed in these sections it is manifest that the power of appointment to all civil offices was intended to be, and was, confided, not to

Md.]

Opinion of the Court.

the Governor alone, but to the *Governor and Senate*, and that the Governor has no power to appoint to office, without the advice and consent of the Senate, except to fill vacancies in offices, which may occur during the recess of the Senate, or, as provided by the fourteenth section, within ten days before its final adjournment." Or, as was said by JUDGE ALVEY, in a concurring opinion in that case: "Now it is too clear for question, that the Governor cannot make a vacancy in the office by appointing a successor to the incumbent. The vacancy must actually exist before the power of appointment can be exercised; for it is only the existence of the vacancy that can call into activity the power to appoint." JUDGE ALVEY had previously said: "There is one thing clear, and that is, that it is only a *vacancy* in the office that the Governor, under the Constitution, is authorized to fill, without the concurrence of the Senate," and, after stating that the only exception to making appointments with the advice and consent of the Senate exists in case of vacancies that occur during the recess or within ten days before its adjournment, added: "This exception exists, and is provided for, from the necessity of the case; and it is only in case of a vacancy so occurring, that the Governor has power to fill it without the advice of the Senate, and that simply because such advice and consent cannot readily be obtained. *The Governor has no power of appointment except as expressly provided by the Constitution or statute; and if he attempts to make an appointment without such express authority, that appointment would simply be without effect.*"

Then section 11 provides that: "In case of any vacancy during the recess of the Senate, *in any office which the Governor has power to fill*, he shall appoint some suitable person to said office, whose commission shall continue in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall first occur." If then there was a vacancy which the Governor had power to fill, the appointment would have to be

until the end of the next session of the Legislature, or until some other person is appointed to the said office, whichever shall first occur, and it is not pretended that he had such power in this case. If there was no vacancy, then he had no power to appoint, and hence in neither event could he make these *ad interim* appointments.

But it is clear there was no vacancy, and to admit that there was would be an effective answer to the contention that the Governor had the right to suspend, for there can be no doubt that a suspension which would create a vacancy would be equivalent to a removal. If there are vacancies, and the appellees are acquitted of the charges, they could only be again restored by being reappointed. There could be no possible justification in the attempt to suspend them in view of our Constitution and laws, if the suspension created a vacancy, and hence we will not dwell on that or cite other authorities on that subject.

We cannot understand how such cases as *Robb v. Carter*, 65 Md. 321, *County Commissioners v. School Commissioners*, 77 Md. 290, *Sappington v. Scott*, 14 Md. 56, *Kroh v. Smoot*, 62 Md. 172, and others cited in connection with them can aid the appellants. *Robb v. Carter* and similar cases are simply to the effect that, in the absence of some limitation, officers in this State hold over until their successors are appointed and qualify, in order to prevent an interregnum. They did not lessen, but lengthened the terms of the offices involved. The expression in *Kroh v. Smoot* as to an *ad interim* appointment expressly referred to one in which there was a vacancy, by reason of the recess appointment expiring at the end of the session of the Senate. As the appointee for the regular term would not go into office under section 13 of Article 2 until the first Monday of May, there would be a vacancy between the adjournment of the Legislature and that date, which, like other vacancies, the Governor could fill.

What we have already said will relieve us of further reference to authorities cited from other jurisdictions, and, re-

Md.]

Opinion of the Court.

gardless of them, we are of the opinion that, under the Constitution and laws of this State, as construed and interpreted by this Court:

1st. The Governor had no power to suspend the appellees, pending the proceedings against them for removal; and,

2nd. That he had no power to appoint the appellants, Police Commissioners of Baltimore City, because there were no vacancies in those offices, and he could create none by his orders of suspension which he is authorized by the Constitution to fill.

As the conclusions above announced must result in an affirmation of the order appealed from, which denied the appellants the writ of mandamus applied for, the right to which is the real question in this case, we will not, as urged by the appellees to do, pass upon the sufficiency of the charges or express our views as to the power or propriety of the Governor acting on them, inasmuch as it is admitted that they were made at his instance. It may sometimes be desirable for an appellate Court to determine questions presented to it other than those required for the purposes of its judgment, but it is always a matter of great delicacy for one of the co-ordinate branches of the Government to pass on or deal with questions which the Constitution or laws submit to another, and it should be avoided, excepting in so far as necessary. We have no right to assume that the Governor cannot or will not give the appellees a fair and impartial hearing, such as the Constitution and laws of the State demand. If, as contended by the appellees, the charges are not sufficient, either because they do not amount to charges of incompetency or official misconduct, or because they are too indefinite, or if the statute does not authorize the Governor to prefer the charges, or have them preferred, and then afterwards hear the case, such questions can and should be presented to the Governor, and will doubtless receive proper consideration by him.

Syllabus.

[114]

Our refusal to now entertain the above questions cannot prejudice the appellees, for we express no opinion on them, and we are determining a case between the appellees and the appellants, and not one between them and the Governor, who is not a party, although this proceeding is the result of his action.

We deem it proper to add that our examination of the authorities cited has convinced us that our statute regulating the procedure before the Governor in such cases, which was first enacted over a hundred years ago, might with great benefit be amended. In some States the mode of procedure adopted relieves the accused and the one hearing the charges from much of the embarrassment that must necessarily exist when the proceedings are conducted as they seem to be here.

Order affirmed, the appellants to pay the costs, above and below.

ROSETTA COLBURN ET AL. vs. THE UNION PROTESTANT INFIRMARY OF BALTIMORE CITY ET AL.

Construction of a Devise—Termination of Trust—Perpetuities.

A testatrix devised certain property to a trustee, with power to sell and reinvest, and directed him to pay the income to P. during life, but in case P. should not abstain from his intemperate habits, the trustee was directed to withhold the rents and profits and to invest same. Upon the death of P. the trustee was directed to hold the property or its proceeds and the rents and income directed to be invested for the use and benefit of certain named charitable and religious corporations, "the annual rents, profits, interest and income of which I desire to be equally divided among and paid to said institu-

Md.]

Argument of Counsel.

tions as same is received by said trustee." *Held*, that it was not the intention of the testatrix that the trustee, after the death of P., should pay the income of the trust property to the charitable institutions; that the income referred to in the gift to them was the income accumulated during the life of P. and not paid to him; that the trust created by the will ceased upon the death of P., and consequently no perpetuity was created, and that it was then the duty of the trustee, in addition to the *corpus* of the estate, to pay over to the charitable institutions, any profits and income not paid by him to the life tenant.

Decided November 16th, 1910.

Appeal from the Circuit Court of Baltimore City (NILES, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URENER, JJ.

Benj. Rosenheim, for the appellants.

The next of kin, the appellants, have attacked the sixth item on the ground that the trust therein attempted to be created for the benefit of the designated charitable beneficiaries is invalid for the reason that it violates the rule against perpetuities, in that it attempts to create a perpetual trust, and must therefore endure beyond the period of time for which a trust may be legally created. The learned judge has decreed that under this sixth item the purpose of the trust was accomplished upon the death of the life tenant, Paul S. Colburn, and that the estate in remainder created for the benefit of the designated charities is valid, and directed the trustee to pay over to them the fund in his hands.

The opinion of the trial Court impliedly concedes that if the trust were an active trust it would be invalid as a perpetuity, but upholds the trust for the reason that as there

was no active duty in the trustee after the death of Paul S. Colburn, the equitable life tenant, the trustee, after the death of the life tenant, held merely a naked, legal title and the use was, therefore, immediately executed in the remaindermen, the charitable beneficiaries, and there is, therefore, no violation of the rule.

The following cases, among others, show that the rule in Maryland is inhibitory of restraints on the alienation of property interests for a period beyond the period prescribed by the rule, and for this reason alone a perpetual trust which imposes upon the trustee the performance of any duty must be held to violate the rule. *Stannard v. Barnum*, 51 Md. 449; *Heald v. Heald*, 56 Md. 309; *Collins v. Foley*, 63 Md. 162; *Albert v. Albert*, 68 Md. 372; *Dulany v. Middleton*, 72 Md. 78; *Thomas v. Gregg*, 76 Md. 174; *Missionary Society v. Humphreys*, 91 Md. 130.

The will before the Court can be examined in vain for any limitation on the duration of the trust for the benefit of the charities, and the testatrix must have intended that it be perpetual, for otherwise she would have made an absolute devise to the charities direct or in some way limited its duration. Therefore, as the trust may and must endure perpetually to effectuate the testatrix's intention, it is void as a perpetuity under the rule laid down in the case of the *Missionary Society v. Humphreys*, 91 Md. 130.

The case of *Brown v. Reeder* (1908), 108 Md. 653, not only does not impeach the doctrine of the *Missionary Society v. Humphreys* case, but indeed recognizes its force.

In this State charitable or religious trusts are not distinguished from other trusts, and the rule against perpetuities is applied to both alike. 6 *Cyc.*, 905; *Missionary Society v. Humphreys*, 91 Md. 131.

The rule is likewise applicable as well to trusts in personalty as in realty. *Gray, the Rule against Perpetuities* (2nd Ed., sec. 202, page 166); *Deford v. Deford*, 36 Md. 168; *Missionary Society v. Humphreys* (*supra*).

Md.]

Argument of Counsel.

Therefore, even though the directions of the said sixth item of the will creates an equitable conversion of the realty into personalty, the Rule is still applicable and the trust is void.

Whatsoever may be the true conception of the theory and "*modus operandi*" of the rule—whether it be aimed against remote vesting in possession of future interests in property (which is the thesis to the demonstration of which Professor Gray has devoted his energies)—or whether it be regarded as aimed against restraints on alienation of property, and even if it be the case, as Professor Gray asserts (The Rule against perpetuities, section 234 (a), page 700) that "in Maryland alone a considerable series of cases seems to have established for the time, at least, a doctrine contrary to the common law," it is the law of this State that a perpetual trust violates the rule. If this doctrine be erroneous, the error has become too ingrained by perpetuation and unimpeached precedent to be removed other than by legislative enactment.

The sixth item of the will charges the trustees with the exercise of discretion and the performance of duties after the death of Paul S. Colburn and creates an active trust. The learned judge, although impliedly conceding that the trust created by the sixth item is a perpetuity, has upheld it on the ground that no active duties are imposed on the trustee after the termination of the life estate and that therefore the trustee has merely a bare legal title which becomes executed in the "*cestuis*," the charities, and they therefore take an absolute title or estate to the trust fund. This, it is submitted, is erroneous.

The provisions of this sixth item negative any possibility of a claim that the trustee is not charged with the exercise of any active duties after the death of Paul S. Colburn, the life tenant. Not only must he exercise his discretion as to (a) the time when the sale of the trust property shall be made, as to (b) the terms of the sale, as to (c) the disposi-

tion of the proceeds of the sale, but he is also charged with the active duties of renting out the property, paying off the ground rent, taxes and necessary repairs, and then to dispose of the net proceeds of the rent, if the property is not sold during the lifetime of the life tenant, or if it should be sold. to pay over to the charitable beneficiaries.

It will be noticed that the sixth item authorizes and empowers the trustee to sell, "Whenever in his judgment, he shall obtain a fair price for the same."

And it is further provided that: "From and after the death of the said Paul S. Colburn, I direct said Augustus A. Colburn, to hold the half of said property devised to him in trust or the proceeds of the same invested, etc."

It thereby appears that the trustee is clothed with discretion to determine when, in his judgment, to sell, and it is clear from the second quotation above that the exercise of this discretion by the trustee may take place as well after as before the death of Paul S. Colburn, the life tenant. Therefore, even after the termination of the life estate, there are active duties to be performed and an active discretion to be exercised by the trustee. There is not an iota in the will to compel the trustee to sell, if he sells at all, before the termination of the life estate, but on the contrary, a sale after the termination of the life estate is expressly countenanced.

Moreover, the trustee must determine what is a "fair price" for the property, and this is again the exercise of a discretion, an "active duty."

Not only is the trustee authorized to sell after the death of Paul S. Colburn, but the power of the trustee to invest the proceeds of the sale, if any, is not limited as to the time when it shall be done. Indeed, the testatrix seems to have been extremely solicitous that a due regard be had for the preservation of the safety of her estate, and her intention seems to have been to make the trustee the arbiter, at all times, as to when and how the estate should be conserved,

Md.]

Argument of Counsel.

and to give him authority to take at all times such steps as would save it from depreciation or destruction.

The testatrix further directed the trustee to pay off the ground rents, taxes and necessary repairs, "and this duty must be performed until said sale is made." As the sale need not take place until after the life tenant's death, as has been shown, here is another "active" duty in the trustee. The trustee is also charged with the duty to "hold" the property and its income, and to divide and pay over the avails to the designated beneficiaries "as the same is received by the said trustee." Attention is called to the fact that the provision is, not that the trustee allow the beneficiaries to receive the avails, but he is expressly required to pay it over. It will be shown later that a trust to collect and apply or pay over is an "active trust."

The learned judge has decided that the sixth item imposed no "active" duties on the trustee after the death of Paul S. Colburn, and that therefore the equitable remaindermen are entitled to call upon the trustee for a transfer of the bare legal title, and the disposition to them thereby becomes absolute. In support of this ruling, the Court referred to only two cases: *Brown v. Reeder*, 108 Md. 659; *Lee v. O'Donnell*, 95 Md. 538. Both of these cases are readily distinguished from the case at bar.

Thus the following directions or duties imposed on the trustees have been held to make the use an active one, and hence not within the statute, viz.: To pay over the rent or income: *Barker v. Greenwood*, 4 Mees. & W. 429; *Leggett v. Perkins*, 2 N. Y. 297; *McCosker v. Brady*, 1 Barbour Ch. 575; *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 503; *Deibert's Appeal*, 78 Pa. St. 296; *Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575; *Rife v. Geyer*, 59 Pa. St. 393, 98 Am. Dec. 351; *Hubery v. Harding*, 10 Lea, 392.

To lease the property, collect rents, etc.: *Kellogg v. Hale*, 108 Ill. 164.

To apply rents to the maintenance of the beneficiary: *Sylvester v. Wilson*, 2 Term Rep. 444; *Doe v. Edlin*, 4 Ad. & E. 582; *Doe v. Ironmonger*, 3 East, 533; *Vail v. Vail*, 4 Paige, 317; *Gerard Ins. Co. v. Chambers*, 46 Pa. St. 485; *Porter v. Doby*, 2 Rich. Eq. 52.

Or in making repairs: *Shapland v. Smith*, 1 Bro. C. C. 75; *Tierney v. Moody*, 3 Bing, 3; *Brown v. Ramsden*, 3 Moore, 612.

To invest the proceeds or principal, or apply the income of the estate: *Exeter v. Odiorne*, 1 N. H. 232; *Ankhurst v. Given*, 5 Watts & S. 323; *Vaux v. Parke*, 7 Watts & S. 19; *Nickell v. Handly*, 10 Gratt. 336.

To dispose of the estate by sale: *Bagshaw v. Spencer*, 1 Ves. 143; *Wood v. Mather*, 38 Barb. 473.

And for other duties or directions imposed on the trustee, all of which are considered active duties, will be found illustrated and referred to in the fourth volume of *Lawson's Rights, Remedies and Practice*, at page 3373, section 1977.

The duty to collect or receive the rents, profits and income of the estate and pay over the same to persons entitled thereto, is an active duty because it is generally inseparable from the personal control and supervision of the estate by the trustee, and requires that the legal title to the corpus upon which the rents and profits accrue, shall be in the trustee. *Baker v. White*, L. R., 20 Eq. 166; *Barker v. Greenwood*, 4 M. & W. 421; *Silvester v. Wilson*, 2 T. R. 444; *Reynell v. Reynell*, 10 Beav. 21; *Symson v. Turner*, 1 Eq. Cas. Abr. 383, par. 1; *Stile v. Tomson*, 2 Dyer, 210a; 28 *American and English Encyclopedia of Law*, 2nd edition, 926.

The duty to collect and distribute the rents will be implied from general expression in the creating instrument, such as "to hold, manage and control the estate," and it is not necessary in order to give the trustee the legal title to the land that the duty should have been imposed in terms. *Fay v. Taft*, 12 Cush (Mass.) 448; *Pugh v. Hayes*, 113 Mo. 424; *Roberts v. Corning*, 89 N. Y. 225; *Steinhardt v. Cunning-*

Md.]

Argument of Counsel.

ham, 130 N. Y. 292; 28 *American and English Encyclopedia of Law*, 2nd Ed., 927.

Ever since the early common law, a trust to receive and pay over has been regarded as an "active trust" and this conception has been incorporated in the statutes of those States in which the Statute of Uses has been repealed and particular classes of trusts have been declared by the statute to be valid to the exclusion of all others, such as in New York, California, Michigan, Montana, North Dakota, Oklahoma, South Dakota and Wisconsin. *Remsden, Interpretation and Contest of Wills*, 252.

The New York Real Property Law, section 76, defines what are allowable trusts, and subdivision 3 reads: "To receive the rents and profits of real property and apply them to the use of any person," etc. Section 93 provides that the trustee of a passive trust takes no estate. This shows that a trust to receive and pay over is an active trust.

H. N. Abercrombie (with whom were *Joseph Packard* and *Robert H. Smith* on the brief), for the appellees.

Under the provisions of *Sophia E. Stimpson's* will, after the death of the life tenant there was no active duty vested in the trustee and the trust is executed. Before the death of the life tenant the trustee is directed to pay ground rent, taxes, etc., and hold one-half of the net proceeds for the benefit of the life tenant, subject to certain conditions. After his death the trustee is not directed to pay expenses, or to divide, or even to pay at specified periods. The undivided income becomes the property of the remaindermen, in equal shares, "as the same is received."

The duration of a trust estate is to be determined by the purposes of the creator of the trust, and when there is no further duty to be performed by the trustee, and the objects of the trust have been accomplished, the trust will be held to have terminated. *Lee v. O'Donnell*, 95 Md. 538; *Thompson v. Ballard*, 70 Md. 16; *Brown v. Reeder*, 108 Md. 659.

When an estate is given to trustees to pay the income to a person for life and at his death merely to hold the same for the use of other persons named, the trust ceases upon the death of the life tenant for the reason that it remains no longer an active trust. The Statute of Uses in such cases immediately executes the use in those who are limited to take the estate after the death of the life tenant. *Long v. Long*, 62 Md. 65, 66; *Hooper v. Felgner*, 80 Md. 271, 272; *Graham v. Whitridge*, 99 Md. 248, 292; *De Bearn v. Winans*, 111 Md. 474.

A devise of the interest of a fund, or the rents and profits of an estate, as a general rule, passes the fund or the estate absolutely, but such construction will not obtain when the intention of the testator appears from the whole will to be different. *Cooke v. Husbands*, 11 Md. 492.

The gift of the produce of a fund, without a limit as to time, is a gift of the fund, and the legatee takes a vested interest. *Cassilly v. Meyer*, 4 Md. 1. To the same effect is *Merrill v. Am. Baptist Missionary Union*, 73 N. H. 414.

The case of *Missionary Society v. Humphreys*, 91 Md. 131, much relied upon by the appellants, is entirely dissimilar in its essential facts from the present case, and the decision therein has, therefore, no application.

On the question of perpetuity, attention is called to the following cases: In *Bennett v. Humane Impartial Society*, 91 Md. 10, it was said: "If there is no trust, there is no perpetuity which the law condemns." *Trinity Church v. Baker*, 91 Md. 539: Bequest to an incorporated church, "to be invested in safe securities and the annual income applied as follows: As to \$2,000 thereof to the support of the pastor, etc." Held good. *Erhardt v. Baltimore Monthly Meeting, etc.*, 93 Md. 669, holds valid a gift "in trust to hold the same, etc., and apply the income for the use of the school, etc."

Other cases as to gifts of income are: *England v. Prince George's Parish*, 53 Md. 466; *Eutaw Place Baptist Church v. Shively*, 67 Md. 493; *Peter v. Carter*, 70 Md. 140; *Hal-*

Md.]

Opinion of the Court.

sey v. Convention, etc., 75 Md. 275; *Woman's Foreign Missionary Society v. Mitchell*, 93 Md. 199; *Baltzell v. Church Home, etc.*, 110 Md. 244.

BURKE, J., delivered the opinion of the Court.

Sophia E. Stimpson, of Baltimore City, an unmarried woman, died on the 17th day of March, 1878, leaving a last will and testament duly executed to pass real and personal property in this State. The will was admitted to probate by the Orphans' Court of Baltimore City. In this will Doctor Augustus A. Colburn was named as sole executor, and he was also appointed trustee of a certain portion of the testatrix's estate. Doctor Colburn died, and letters *de bonis non* with the will annexed upon the estate of Miss Stimpson were granted to Paul S. Colburn and George G. Hooper, both of whom having died, letters were granted upon her estate to Charles J. Bouchet. George G. Hooper was appointed trustee in the place of Doctor Colburn, and upon the death of said trustee, William G. Towers was by appropriate proceedings appointed trustee in the place and stead of said Hooper, and now holds subject to the order of Court the sum of \$2,386, derived from the sale of the property mentioned in the sixth item of Miss Stimpson's will. Mr. Towers as trustee filed this bill for the construction of that item of her will, and has made the Charitable Corporations named therein, the administrator of Miss Stimpson, and certain of her collateral relatives, who now claim the money in his hands, defendants. The bill states that he is in doubt whether by a true construction of the sixth item of the will the bequests therein contained constitute a void trust, or a continuing trust, or an absolute disposition of the property to the corporations named.

The sixth item of the will is here transcribed: "Item Sixth—I hereby devise and bequeath to Doctor Augustus A. Colburn, of Baltimore City, absolutely, one undivided half part of my leasehold lot and warehouses situated thereon

known as 370 W. Baltimore street in the City of Baltimore which is subject to a yearly rent of one hundred and fifty dollars (\$150.00) and I further devise and bequeath to said Augustus A. Colburn the other undivided half part of said lot and warehouse to be held in trust for the use and benefit of my nephew Paul S. Colburn for and during his lifetime and I hereby authorize and empower said August A. Colburn, trustee, to sell and convey the said half part of said lot and house devised to him in trust whenever in his judgment he can obtain a fair price for the same and I desire that the proceeds of such sale shall be invested in ground rents or other good and permanent securities to be held by him in trust for the use and benefit of the said Paul S. Colburn for and during his lifetime and until said sale is made I desire said trustee to rent out the whole of said property and collect annually the rent for the same and after paying off the ground rent, taxes and necessary repairs to hold one-half of the net proceeds of said rent for the use and benefit of said Paul S. Colburn and to pay the same or the incomes and profits arising from proceeds of sale of said trust property to Paul S. Colburn during his lifetime. But this trust in favor of Paul S. Colburn is made upon this condition that no part of said rents or of the incomes and profits arising from the proceeds of said trust property shall be paid by said trustee to my said nephew, Paul S. Colburn, so long as he continues to indulge in the use of intoxicating drink, and said trustee is directed to withhold from said Paul S. Colburn the payment of any of said rents and incomes and profits until he is satisfied that my said nephew has given evidence of a permanent reformation in his habits of intemperance and if such reformation should never take place then in that event said trustee is directed to keep safely the rents and incomes and profits arising from said trust property and loan the same out from time to time on good security until the death of said Paul S. Colburn, and from and after the death of said Paul S. Colburn I direct said August A. Col-

Md.]

Opinion of the Court.

burn to hold the one-half of said property devised to him in trust or the proceeds of the sale of the same invested as heretofore directed together with any of the rents, incomes and profits thereof which he is directed to loan out during Paul S. Colburn's lifetime, for the use and benefit of the Union Protestant Infirmary of Baltimore City, the Board of Foreign Missions of the Presbyterian Church of the United States, The Maryland Bible Society and the Presbyterian Board of Relief, for disabled ministers and the widows and orphans of deceased ministers, the annual rents, profits, interest and income of which I desire to be equally divided among and paid to said institutions as the same is received by said trustee."

In the construction of wills it is the duty of the Court to ascertain the intention of the testator, and that intention, as gathered from the four corners of the will read in the light of surrounding circumstances existing at the date of the will is to prevail, unless it contravene some positive principle of law, or be frustrated by some unbending rule of construction assigning an inflexible meaning to particular words.

In *Woman's Foreign Missionary Society v. Mitchell*, 93 Md. 202, the rule is stated by JUDGE McSHERRY in language which may be appropriately applied to the attempt made in this case to frustrate the evident intention of Miss Stimpson with respect to the fund involved in this controversy.

"The cardinal canon," said the Judge, "around which all others centre is this, that the intention of the testator when ascertained from the whole instrument, or from the instrument as read in the light of surrounding circumstances existing at the date of its execution, must be given effect if that intention does not antagonize or conflict with some rule of law or property. At the threshold we are met face to face by the fact which stands out prominently, that the attempt made under the second of the consolidated bills is to strike down the intention of the testatrix, though that intention ought to be gratified if it is legally possible to do so. If the

collateral kindred who filed that bill succeed in getting the property disposed of by the residuary clause just quoted, they will get it, not because the testatrix wished them to have it, but in spite of the obvious fact that she did not want them to possess it at all. Her intention would be defeated instead of being respected."

It is contended by the appellants that the sixth item of the will creates a trust, after the death of Paul S. Colburn. the life tenant, in favor of the charitable corporations mentioned, and that that trust is void, because there is no limit to its duration. In our opinion the discussion of the rule against perpetuities has no proper place in this case, nor is it necessary to determine what constitutes "active duties" imposed upon trustees, because as we understand Miss Stimpson's will she created no trust after the death of Paul S. Colburn in the property mentioned in the sixth item of her will. If, therefore, there be no trust, there is no perpetuity to be condemned.

"It is obviously essential to the creation of a trust, that there should be an *intention* of creating a trust, and, therefore, if upon a consideration of all the circumstances, the Court is of opinion that the settlor did not mean to create a trust, the Court will not create a trust when none in fact was contemplated." 1 *Lewin on Trust and Trustees*, 113.

We said in *Bennett v. Humane Imp. Socy.*, 91 Md. 19: "A trust may be created either by the use of appropriate technical words which, of their own proper vigor, indicate that a trust was designed to be raised; or, in the absence of such words, a trust may be created by other language when the purpose to establish it is otherwise sufficiently apparent. In both instances, however, it always becomes a question of intention as to whether a trust exists. If there be a manifest design to establish a trust then a trust will be declared though no apt technical words be employed; and if there be an equally manifest design not to establish a trust, then no

Md.]

Opinion of the Court.

trust will be declared though the words employed would, but for the contrary intention, be sufficient to create a trust."

In *Pratt v. Sheppard & Enoch Pratt Hospital*, 88 Md. 627, JUDGE MCSHERRY said: "If it be uncertain as to whether there was an intention to create a trust, it is obviously not the province of the Court to engraft a trust upon the gift."

The lower Court decreed that the purpose of the trust created by the sixth clause of the will of Miss Stimpson was terminated upon the death of the life tenant, and that the estate in remainder by that clause passed absolutely to the corporations therein mentioned, and the trustee was directed to pay over the fund in his hands representing the trust estate formerly held for the said life tenant to the four corporate bodies in equal shares.

Obviously, what the testator said in her will is the best evidence of her intention. Turning now to the will we find that the subject matter of the bequest made by the sixth item thereof was a leasehold lot and warehouse located in the city of Baltimore. This lot was subject to a yearly rent of one hundred and fifty dollars. She devised and bequeathed to Doctor Colburn, absolutely, one undivided half part of this lot and warehouse. The other undivided one-half part thereof she devised and bequeathed to Doctor Colburn to be held in trust for the use and benefit of Paul S. Colburn, her nephew, for and during his life. She empowered the trustee to sell and convey the half part of said lot and warehouse held in trust whenever in his judgment he could obtain a fair price for the same, and she desired that the proceeds of such sale should be invested in ground rents or other good securities to be held by him in trust for the use and benefit of her said nephew during his life, but until the sale should be made the trustee was required to rent the whole property and collect the annual rent from the same, and after paying the ground rent, taxes and necessary repairs, to hold one-half of the net proceeds of the rent for the use and benefit of Paul

S. Colburn, and to pay the same, or the incomes and profits arising from the proceeds of sale of the trust property to him during his life. Paul S. Colburn, the equitable life tenant, as appears from the will was addicted to the excessive use of intoxicating drink, and the testatrix declared that the trust in his favor was made upon this condition "that no part of said rent or the incomes or profits arising from the proceeds of said trust property shall be paid by said trustee to my said nephew, Paul S. Colburn so long as he continues to indulge in the use of intoxicating drink, and said trustee is directed to withhold from said Paul S. Colburn the payment of any of said rents and incomes and profits until he is satisfied that my said nephew has given evidence of a permanent reformation in his habits of intemperance, and if such reformation should never take place then in that event the said trustee is directed to keep safely the rents and incomes and profits arising from said trust property and loan the same out from time to time on good security until the death of said Paul S. Colburn."

From and after his death, the trustee was directed to hold the trust property devised to him in trust, or the proceeds of the sale of the same invested "as hereinbefore directed together with any of the rents, incomes and profits thereof which he was directed to loan out during Paul S. Colburn's lifetime, "for the use and benefit of the corporate charitable organizations named, *"the annual rents, profits, interest, and income of which I desire to be equally divided among and paid to said institutions as the same is received by said trustee."*

It is upon the words which we have italicized that the contention is made that a trust was created as to the property bequeathed to these institutions, and that the trust is void, because it is repugnant to the rule against perpetuities. The trust created in favor of Paul S. Colburn for life is clear and specific. The trustee was not bound absolutely to pay over to him the rents, income, and profits coming into his

Md.]

Opinion of the Court.

hands from the trust property. He was expressly authorized to withhold such payments until he was satisfied that the life tenant had "given evidence of a permanent reformation in his habits of intemperance." It was, therefore, contemplated by the testatrix that at the death of the life tenant, the trustee, in addition to the *corpus* of the trust estate, might have in his hands rents, profits and income received by him as trustee, and not paid over to the life tenant. These she likewise directed by the language italicized should be equally divided among the institutions named in her will. This we think is the plain meaning and intention of the testatrix. It, therefore, follows that upon the death of Paul S. Colburn, the life tenant, the trust created by the sixth item of Miss Stimpson's will was at an end, and that the fund in the hands of the appellant belongs absolutely to the institutions named in that clause of her will, and should be paid to them as directed by the decree of the lower Court.

The appellant now has no title to, or interest in the property or funds received by him in his capacity as trustee, and his duty is to pass the same over to said institutions. The only trust created by the sixth item is one in favor of Paul S. Colburn for life and after his death the testatrix intended that the legatees in remainder should take absolute legal estate in the property bequeathed to them. This case falls directly within the rule stated by JUDGE SCHMUCKER, in *Prince DeBearn v. Winans*, 111 Md. 474: "It has repeatedly been held by this Court to be the firmly settled law that where an estate is given to trustees in trust to pay the income to a person for life and at his or her decease merely to hold the same for the use of other named persons, the trust ceases upon the death of the life tenant, because its purposes have been accomplished. In such case where the trust property consists of realty, the statute of uses executes the use and vests the legal title in the party to whom the estate was limited at the expiration of the life estate, and a somewhat similar result occurs when the estate consists of personalty,

unless there be an apparent intention to the contrary, although the statute of uses is, strictly speaking, not applicable to personal property."

*Decree affirmed, the costs above and below
to be paid out of the fund.*

JOSEPH C. STOUFFER vs. ALBERT G. ALFORD.

*Bills and Notes—Pleading—Acceptance of Bill Procured by
Fraud—Burden of Proof on Holder to Show Good Faith—
Sufficiency of Evidence of Fraud—Instructions
to the Jury.*

In an action against the acceptor of a bill of exchange, a special plea on equitable grounds, alleging that the defendant's acceptance had been obtained by fraudulent representations, is defective in that it fails to charge that the plaintiff had notice of the alleged fraud, and also because the defense of fraud in such case is admissible under the general issue plea.

When the maker or acceptor of a negotiable instrument in an action against him by the holder produces evidence to show that his signature was obtained by fraud, the burden of proof is then cast upon the plaintiff to show that he acquired the instrument before maturity, for value, and without notice of any defect or fraud.

Defendant was induced to agree to give a trial order for certain jewelry and to accept drafts for the price, upon the faith of representations made to him that articles of that kind were to be furnished to only one other dealer in the city; that they were of first-class quality and would last for twenty years; that the seller guaranteed the sale of enough of the jewelry during the coming season to pay for all of it, and that the seller would buy back at cost price, at the end of the year, any goods left on defendant's hands. *Held*, that evidence

Md.]

Statement of the Case.

that these representations were made and that they were false, is admissible in an action upon the acceptances, to show that they were obtained by fraud, and such evidence, if found to be true by the jury, is sufficient to justify a verdict for the defendant.

In an action against the acceptor of a bill of exchange, the jury was properly instructed at the instance of the defendant, that in determining whether or not his signature was procured by fraud, the jury were to consider all of the circumstances concerning the transaction given in evidence, and if the jury found that the agent of the drawer of the bill represented to the defendant at the time of the sale of the goods for which the bill was drawn and accepted that the drawer was the manufacturer of the goods; that they were of fine quality and guaranteed to wear for twenty years; that goods of that kind would be sold to only one other dealer in the city, and that if the jury found that similar goods were sold to other merchants, and that they were practically worthless, the jury may infer that defendant's signature was obtained by fraud, and if they so find their verdict should be for the defendant.

Held, further, that a prayer offered by the plaintiff was properly rejected which instructed the jury that a failure by the seller to fulfil his promises would not constitute fraud in procuring the acceptance of the draft. This prayer segregates a single circumstance from others closely related.

Held, further, that the plaintiff in this case did not ratify the contract of sale and waive his right to claim that his acceptance of the draft had been procured by fraud by keeping the goods and offering them for sale.

Decided November 16th, 1910.

Appeal from the Superior Court of Baltimore City (Stock-BRIDGE, J.).

Plaintiff's 4th Prayer.—If the jury shall find from the evidence that the defendant is a business man and was able to read and write and that he signed the contract with the Lyon-Taylor Company testified to in this case, and that he

subsequently, a week or more later, accepted or signed the drafts in accordance with the said contract then the said defendant is thereby presumed to have known and agreed to the terms of the said contract, and that he cannot now claim that he was induced to sign or accept the drafts because of any false representations as to its terms and conditions, if the jury shall find that such false representations were made. (*Refused.*)

Plaintiff's 5th Prayer.—That if the jury shall find that, by the defendant's own evidence he was able to read and write and signed the contract or order for the goods, and a week or more later, about October 26th, 1904, he received the goods, put them on sale, and actually sold some of them, and kept the said goods on sale until after Christmas, during all of which time he had a copy of the contract in his possession, then the said defendant cannot evade liability on the said drafts accepted by him in accordance with the contract, because of any fraudulent representations as to the terms of the said contract, even though the jury shall find that such representations have been made, and the jury is instructed that the said defendant by his said course of conduct has waived any rights he might have to make that contention and that he has ratified his action in accepting the said drafts and is bound thereby. (*Refused.*)

Plaintiff's 6th Prayer.—That the defendant (even if he was induced to enter into the contract with the Lyon-Taylor Company and to accept the drafts offered in evidence, by reason of false statements and representations made by the salesman of that company),—was bound upon discovering the said statements and representations to be false to promptly rescind his contract, and that the testimony in this case does not show that he did act promptly in rescinding the same, and therefore the verdict of the jury must be for the plaintiff. (*Refused.*)

Plaintiff's 7th Prayer.—That even if the jury shall find that the Lyon-Taylor Company failed to fulfill any of its

Md.]

Statement of the Case.

promises or agreements contained in the contract or any of the promises made by its salesman, that these facts would not constitute fraud in the procuring of the drafts offered in evidence. (*Refused.*)

Plaintiff's 8th Prayer.—That in order to entitle the defendant to claim that his signature and acceptance of the drafts offered in evidence were obtained by fraudulent representation that similar goods had not been sold to other people, he must show (1) that that statement was false in fact, (2) that it was a material consideration inducing said defendant to enter into said contract and to accept said drafts, and (3) that he relied on that representation and would not have accepted the drafts except for said representation. (*Granted.*)

Defendant's 2nd Prayer.—The jury are instructed that in determining whether or not the defendant's signature to the instruments sued on was procured by fraud, they are to consider all the circumstances surrounding the signing of same by defendant as detailed in evidence, and all the other evidence in the case; and if the jury find that the agent of the Lyon-Taylor Company represented to defendant at the time of the sale of the goods to defendant that the Lyon-Taylor Company was the manufacturer of said goods, that the goods are of fine quality and guaranteed to wear from five to twenty years; that no goods would be sold in West Baltimore and only to one dealer in East Baltimore; and if the jury further find that the goods were of inferior quality and practically worthless, that other goods were sold by the Lyon-Taylor Company to other merchants in West Baltimore; then the jury must infer from these facts and the other evidence in the case that defendant's signature to the bills of exchange sued on was procured by fraud, and if they so find their verdict should be for the defendant. (*Granted as modified.*)

Defendant's 5th Prayer.—If the jury believe that certain merchandise was sold to the defendant by the Lyon-

Taylor Company upon the representation made by its agent among others that no other merchandise would be sold by it within certain bounds of defendant's business; that the defendant was induced by said representations to sign the said bills of exchange sued on; that but for said representations he would have not signed them, and that merchandise was sold by the company to others within said bounds, then the jury may infer that the signature of the defendant were procured by fraud, and if the jury so find the signatures were procured by fraud their verdictt should be for the defendant. (*Granted as modified.*)

Defendant's 7th Prayer.—If the jury believe from the evidence that the defendant was induced to sign the bills of exchange sued on by a misrepresentation among others of the agent of the Lyon-Taylor Company as to the kind of quality of the merchandise sold by said company to defendant, then the jury may infer that the signatures of the defendant were procured by fraud, and if the jury so find that the signatures of the defendant were procured by fraud their verdict should be for the defendant. (*Granted as modified.*)

Defendant's 9th Prayer.—The jury are instructed that gross inadequacy of consideration is one of the badges of fraud, and they may consider the evidence of the value of the jewelry, and the price at which it was sold to defendant in connection with other representations, if any, of the agent of the Lyon-Taylor Company to defendant in arriving at a conclusion as to whether or not the defendant's signature to the bills of exchange sued on was secured under such circumstances as to amount to fraud. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

John G. Schilpp and Clifton Maloney (with whom was Tracy L. Jeffords on the brief), for the appellant.

Md.]

Opinion of the Court.

Wm. Henry White and Frederick J. Singley, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appellant, claiming to be the lawful holder of four overdue negotiable drafts which had been accepted by the appellee, sued him thereon in the Superior Court of Baltimore City.

The declaration alleged that the drafts had been drawn upon the appellee by Milbert T. Price and Louis E. Lyon, trading as Lyon-Taylor Company, and, after their acceptance by him, had been endorsed by Lyon-Taylor Company to the appellant for value, before maturity and without notice of any defect therein. The appellee, as defendant, pleaded the general issue pleas and a special plea as an equitable defense averring that his acceptance of the drafts had been procured without consideration and by fraud, misrepresentation and deceit. The plaintiff demurred to the special plea, but his demurrer was overruled by the Court whereupon he joined issue on all of the pleas.

At the trial of the case the plaintiff offered the drafts in evidence and then, upon the admission by the defendant of his signature to the acceptances, rested his case. The defendant offered evidence tending to prove that his acceptance had been fraudulently procured. This evidence was admitted, over the plaintiff's objection, subject to exception and at the close of the defendant's case the plaintiff moved to strike it out but the Court overruled the motion. The plaintiff then, without any proof of the circumstances under which he obtained the acceptances or of his *bona fides* in that connection or his want of notice of any facts or circumstances impeaching their validity, contented himself with offering evidence tending to contradict the testimony of the plaintiff's witnesses, that much of the jewelry for which the drafts had been drawn had been charged to the defendant at grossly excessive prices.

The verdict and judgment below having been for the defendant the plaintiff took the present appeal.

We will dispose first of the issue raised by the demurrer to the special plea setting up fraud in procuring the defendant's acceptance of the draft. That plea was defective in failing to charge the plaintiff with knowledge or notice of the alleged fraud. *Banks v. McCosker*, 82 Md. 521; *Black v. Bank of Westminster*, 96 Md. 415-416. It was bad for the further reason that the alleged fraud in procuring the acceptances could have been set up by a plea at law and was therefore not available as an equitable defense. *Robey v. State*, 94 Md. 71. The fact that this plea was defective was not vital to the defense relied on in the case, for the defendant was entitled under the general issue plea to introduce evidence of the fraud practiced in procuring his acceptance of the drafts constituting the cause of action in the suit. *Banks v. McCosker*, 82 Md. 521; *Groff v. Hansel*, 33 Md. 164; *Griffith v. Shipley*, 74 Md. 601.

The important inquiry in the case is whether the evidence that was offered in behalf of the defendant upon the question of fraud in the inception of the acceptances was legally sufficient to go to the jury. If it was properly submitted to them, not only were they the exclusive judges of its weight, but its introduction cast upon the plaintiff the burden of proving that he had acquired the acceptances *bona fide*, for value, before maturity, and without notice of any facts impeaching their validity—a burden which he did not attempt to discharge. That proposition, as to the shifting of the burden of proof under such circumstances, after having been repeatedly asserted in the opinions of the Court, has recently incorporated into the Statute Law of the State. *Totten v. Bucy*, 57 Md. 446; *Williams v. Huntington*, 68 Md. 591; *Griffith v. Shipley*, 74 Md. 599; *Cover v. Myers*, 75 Md. 406; *Arnd v. Heckert*, 108 Md. 300; *Banks v. McCosker*, 84 Md. 297; *Code Public General Laws*, Art. 13, secs. 74, 78.

Md.]

Opinion of the Court.

Turning now to an examination of the evidence on behalf of the defendant Alford we find his own uncontradicted testimony to be substantially as follows: In September, 1904, a young man come to Alford's store in Baltimore professing to be a salesman of the Lyon-Taylor Company, which he described as the largest or one of the largest jewelry manufacturing concerns in the world, and tried to interest him in a line of jewelry. On being told by Alford that he was not a jeweller, but a dealer in sporting goods and knew nothing about jewelry or its prices and did not wish to handle it, the salesman urgently pressed him to take a line of jewelry saying that the company desired to have him for its distributing agent in West Baltimore—that it already had a Mr. Thompson as its agent for East Baltimore and that none of its goods would be supplied to any other merchants in Baltimore,—that the jewelry was first class and would last for twenty years,—that there was a large profit in it and that he would guarantee that Alford would sell enough of it during the holidays to pay for the whole lot,—that the company would buy back from him at cost price any goods that he had on hand at the end of a year, and making other statements of a similarly seductive character.

Alford, being then in feeble health as the result of a recent surgical operation, yielded to the persuasion of the salesman and consented to have a "trial order" of the goods sent to him for sale, and signed a printed order therefor tendered him by the salesman, who then promptly departed. The "trial order" according to the provisions of the paper signed by Alford was to be composed of articles made of sterling silver, rolled gold plate, etc., to the value of \$380, to be selected by the vendor company, at prices ranging from the lowest to the highest of a stated list.

On the following day Alford, believing that he had been induced to do what he ought not to have done, wrote a letter appearing in the record to the Lyon-Taylor Company telling them so and requesting them not to send him the jewelry.

No reply was received to this letter, but a week or two afterwards a different young man came to Alford's store with the jewelry. When told of the letter of countermand written by Alford he said the company had not received it and that the company would not allow the cancellation of orders. Alford, being still ill, was prevailed upon by the young man to receive the goods and sign the acceptances, for their price, forming the cause of action.

Alford put the jewelry in his store window but was unable to sell more than two small pieces of it up to November 30th when he wrote to the company informing them of the situation and advising them to put it elsewhere, but offering to continue his efforts to sell it in their interest through the holidays if they desired. He received no reply to the letter.

The defendant also proved by four witnesses doing business in West Baltimore that, shortly after the time of the transaction testified to by him, each one of them had been visited by a salesman from the Lyon-Taylor Company or the Puritan Manufacturing Company which was admitted to be the same enterprise under another name, and induced to buy a "trial order" of jewelry by representations similar to those made to the defendant. By two other witnesses doing business in Baltimore he proved that attempts had been made by the agent of the same company to sell "Trial orders" of the jewelry to them by like representations.

The defendant further proved by William J. Miller, a jeweller of fifteen years' standing, that many of the articles of jewelry included in the "Trial order" sent to the defendant were of an inferior order and would last but a few months and were not worth more in some cases than one-fourth of the prices at which they were charged to the defendant.

The plaintiff put on the stand Charles Becker, also a jeweller of long standing, who gave evidence of a contrary tenor as to the value of the jewelry in question.

Md.]

Opinion of the Court.

We think the evidence offered on behalf of the defendant was admissible. Having signed a written order to ship the goods to him upon the terms and conditions of the so-called printed contract on which the order was endorsed, he was not at liberty to introduce parol evidence to vary the terms of his order but he could show by such evidence that he was induced to sign it by fraud. *Hurn v. Soper*, 6 H. & J. 276; *David v. Hamblin*, 51 Md. 540; *Wilson v. Pritchett*, 99 Md. 583. And he could introduce such evidence for that purpose even though it tended to contradict some of the declarations embodied in the written contract. *Southern Advertising Co. v. Metrople Co.*, 91 Md. 61; *Wilson v. Pritchett*, *supra*; *Bierly v. Dodson*, 107 Md. 233; *Willis v. Kern*, 21 La. Ann. 749.

We think the evidence to which we have adverted was proper to be considered by the jury in determining whether the defendant's acceptance of the drafts had been fraudulently procured by the agent of the drawer. Fraud need not be established by direct evidence but may be, and generally must be, detected by a consideration of the acts, declarations and condition of the parties at or about the time of the transaction and all of the circumstances surrounding it. Even the acts of the parties toward third persons have been held to be admissible in evidence to show the *quo animo* of the particular transaction, and such acts may be proven by the third parties. *McAleer v. Horsey*, 35 Md. 461; *Cooke v. Cooke*, 43 Md. 522; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 491; *Lincoln v. Clafflin*, 74 U. S. 132; *Butler v. Watkins*, 80 U. S. 456-464.

Having determined the controlling legal principles involved in the controversy before us we can dispose without difficulty of the specific rulings of the Court below to which exceptions were taken in the course of the trial.

The first four exceptions were taken to the admission of portions of the evidence to which we have already adverted

and the fifth exception was to the refusal of the Court to strike it out. What we have already said sufficiently disposes of those exceptions.

The remaining exceptions were to the rulings made below in connection with the prayers. The plaintiff offered twelve prayers of which the Court granted the first, eighth and tenth and rejected the others. The defendant offered nine prayers of which the Court granted the second, fifth and seventh after modifying them in certain respects and granted the ninth in the form in which it was offered and rejected the others. Those of the prayers to which we shall refer will be set out by the reporter.

The granted prayers of the defendant, in the modified form in which they were granted, asserted in effect two propositions. The first was that the jury, in determining whether the defendant's signature to the acceptances sued on has been procured by fraud, should consider the evidence as to all of the circumstances surrounding the act of his signing them including the acts and representations of the agent of the Lyon-Taylor Company and the evidence touching the sales made by the same parties of similar goods to other merchants in West Baltimore. The second was that if the jury found that the defendant's signature to the acceptances had been procured by fraud their verdict should be in his favor.

There was no error in granting those prayers. We have sufficiently stated in the earlier portion of our opinion the law controlling their first proposition. In reference to their second proposition it is only necessary to say that the proof of fraud in the procuring of the acceptances threw upon the plaintiff the burden of showing himself to have been a holder of them in due course, and as he made no attempt whatever to do that there was nothing left for the jury to do but find a verdict for the defendant.

The plaintiff's second, third and ninth prayers were properly refused because they required the jury to find for the plaintiff for want of legally sufficient evidence to sustain in

Md.]

Opinion of the Court.

whole or in part the defense relied on by the defendant. We think, for the reasons already stated, that there was enough evidence, in the case, if the jury believed it, to justify their verdict. His seventh prayer was bad in segregating the single circumstance of a failure of the sellers to fulfill the agreement of sale from the other facts in the case to which it bore a close relation and asking an instruction upon the effect of that circumstance alone. His fourth, fifth and sixth prayers assert that the defendant was estopped by certain particular acts of his own from relying upon the defense of fraud in the procuring of the acceptances. We cannot assent to the proposition of those prayers as applied to the present case. The defendant's conduct, in considering the method of obtaining his signatures to the acceptances, must be considered as an entirety. Furthermore the fact of proving the fraud did not of itself constitute a complete defense to the suit of the plaintiff as a holder of the acceptances. It simply put upon him the burden of proving that he was, what he pretended to be, a *bona fide* holder of them for value and without notice. He lost his case by making no attempt at all to verify by proof that essential fact of his own title.

The case is one of a now familiar class to which belong those of *Totten v. Bucy*, 57 Md. 446; *Griffith v. Shipley*, 74 Md. 591; *Cover v. Myers*, 75 Md. 406; *Wilson v. Pritchett*, 99 Md. 583; *Arnd v. Heckert*, 108 Md. 300.

The judgment appealed from will be affirmed.

Judgment affirmed, with costs.

PETER GINTHER vs. THOMAS P. TOWNSEND,
EXECUTOR, ET AL.

Specific Performance—Misrepresentation as to Subject-Matter—Title of Vendor.

Specific performance will not be decreed of a contract to purchase land when the defendant was induced to enter into it on account of misrepresentations as to the extent or boundaries of the land, although such misrepresentations were made in good faith and without knowledge on the part of the vendor of their inaccuracy.

Defendant agreed to buy a tract of land known as the M. farm, paid part of the purchase money, agreed to give a mortgage for the balance when the deed was executed to him, and entered into possession. At the time the agreement was made, the vendor pointed out the lines of the farm and said that it bounded for some distance on a county road. It was agreed that the deed to be executed would contain an accurate description, after a survey should be made. The survey disclosed the fact that the boundary of the farm fell short of extending to the county road by several hundred yards. *Held*, that on account of this misrepresentation as to the subject-matter, the contract of purchase should not be specifically enforced.

When a party whose interest in certain land is defeasible in the event of his death without issue, a contract to sell the land in fee simple is not enforceable by his heirs at law after his death.

Decided November 18th, 1910.

Appeal from the Circuit Court for Worcester County
(JONES, J.).

Md.]

Opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and UERNER, JJ.

H. L. D. Stanford (with whom were *Joshua W. Miles* and *John W. Staton* on the brief), for the appellant.

John H. Handy, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appeal in this case was taken from a decree of the Circuit Court for Worcester County. The decree directs a specific performance of a contract for the sale of a certain farm known as the "Milbourne Farm." The bill of complaint was filed by Thomas P. Townsend, the executor of the will of Irving S. Townsend, the vendor. The bill alleged that on the 25th of January, 1906, the plaintiff's testator sold the farm to the defendant, and that he immediately entered into possession of the property under the contract, and has ever since been in possession of the same; that Irving S. Townsend tendered himself ready with his wife to execute a deed for the property to the defendant in pursuance of the contract of sale; that at the time the tender was made there was no incumbrance of any kind upon the property; but that the defendant refused to accept the deed for the farm; that the defendant had paid three hundred dollars on account of the purchase money, and had refused to make any further payment. The bill further alleged the death of Irving S. Townsend, leaving a widow and two children surviving him, and that the widow was ready and willing to release her rights in the property. It further alleged that the plaintiff had been appointed and qualified as the executor of the last will of the deceased vendor. The bill prays first, that the defendant may be compelled to specifically perform the contract, to accept a deed for the property from Catherine Townsend, widow and the plaintiff as executor of Irving S.

Opinion of the Court.

[114]

Townsend, to execute a mortgage upon the property to the plaintiff in accordance with the contract for the balance of the purchase money, and for general relief.

On the day the agreement of sale was made the vendor executed and delivered to the defendant the following memorandum in writing:

"Pocomoke City, Md., Jan'y. 25, 1906. Received of Peter Ginther, of the State of Ohio, his check on the People's Saving Bank of Canton, Ohio, for the sum of Three Hundred Dollars (\$300.00), which when paid will be in part payment of all that farm or tract of land situated in Atkinson Election District of Worcester County, Md., on the north side of Pocomoke River, and which is known as the 'Milbourne Farm' or by whatever name or names the same be known or called which I have this day sold to Peter Ginther for the sum of Two Thousand Dollars (\$2,000.00); balance of purchase money to be paid as follows: five years' time is to be given on a mortgage which is to be given to said Townsend, his heirs or assigns, on receipt of a good and sufficient deed, clear of all encumbrance of every kind: the purchaser reserves the right to pay any part or all cash at any time before maturity. The purchaser is to have full and free possession of the hereby described property immediately.

"Witness my hand and seal.

"IRVING S. TOWNSEND. (Seal)."

The answer admitted the agreement of purchase, and alleged that it was agreed between the defendant and the vendor that the deed should contain an accurate description of the property purchased, said description to be after survey and by courses and distances according to certain lines pointed out to the defendant by Irving S. Townsend before the sale as the lines of the property purchased, and that these lines pointed out were the basis of the purchase. It denied that the vendor ever tendered himself ready to execute a good and sufficient deed for the property in pursuance of the

Md.]

Opinion of the Court.

contract, or that the defendant ever refused to accept from the vendor a good and sufficient deed for the property. The answer further alleged that the defendant is ready and willing at any time, and has always been ready to fully perform his part of the contract upon the receipt by him of a good and sufficient deed for the property pursuant to the contract.

The vendor acquired title to the property sold under the will of his mother, Elizabeth S. Townsend, dated 22nd of May, 1886. The ninth item of that will reads as follows: "I give and devise unto my son, Irving S. Townsend all that farm known as "The Milbourne Farm;" but in case the said Irving should die without leaving lawful issue living at the time of his death, I give and devise the said farm known as "The Milbourne Farm" unto my son John Glenn Townsend in fee simple." The case was heard in lower Court upon bill, answer and testimony, and the Court decreed that the plaintiff was entitled to the relief prayed for in the bill, and the property which it decreed the appellant should accept was that embraced in a description filed in the case and made by Levin H. Hall, a surveyor.

Mr. Hall testified that he made a survey of the property by direction of Irving S. Townsend and according to certain papers which Mr. Townsend gave him; that Mr. Townsend said he had fulfilled his part of the agreement when the survey was made. He stated that he was to have a survey made of Milbourne Farm, and that the farm should contain about one hundred and ninety-five acres. After the survey had been made, Mr. Townsend said he thought it was correct; that he did not know the lines positively, but thought the farm was of a larger circumference.

On the northeast side of the property embraced in the description there is a county road which leads from Pocomoke City to Snow Hill, and when asked to state the distance the nearest point of the land surveyed by him was to the county road Mr. Hall said: "It may be an eighth of a mile; it may

be a quarter of a mile. I can't even approximate it, but it is certainly not within three or four hundred yards."

Mr. William E. Walton, a member of the real estate firm of F. H. Dryden & Co., testified that Irving S. Townsend placed the farm with that firm for sale. He further testified that he spoke to different persons about the farm, but never seemed to interest anyone until the appellant visited Maryland in the winter of 1905 or 1906, and that among other properties he showed him the Irving Townsend Farm. Mr. Ginther seemed interested in the property and wanted to see around it; to see where the lines were. "I told him that Mr. Townsend had represented that this tract came out to the public road, as I think the northeast corner of the property, and it followed some distance along with the road, and then went into the woods, and at the other side he thought about somewhere about seventy-five yards of the public road. This did not satisfy Mr. Ginther, so I took him to Mr. Townsend's home, but he was not at home, had gone over to the Oak Hill Farm, if I remember right, and wanting to see him we continued our course to this place, but met him on the road and tried to get further information from him in regard to his boundaries. He represented to Mr. Ginther just what he had done to me, but he did not know just where the line was, as I remember, between himself and his brother, but that he had been intending to have it surveyed and was going to have that survey and that the tract came out—he repeated the same to him that he did to me—that it came out to the public road and followed it quite a distance, and at the other end goes into the woods, didn't follow the road all the way around, left the road and went in the woods at the other end and at the northwest corner would be about seventy-five yards from the public road." The witness further said that Mr. Townsend seemed to be indefinite in regard to the lines of the property, and that Mr. Ginther said he would want a survey made, and at that time Mr. Townsend said he intended to have a survey

Md.]

Opinion of the Court.

made of that line; that the location of that line was the only question in Mr. Townsend's mind about the property. Mr. Walton also testified that after the survey had been made, Mr. Townsend stated that he did not know regarding the line, but that he had thought when he represented what he did that the lines went to where he had told the witness.

Upon familiar principles applicable to suits of this character the facts which we have stated, and which are uncontradicted, are sufficient to defeat a suit for a specific performance of the contract. Irving S. Townsend could not have given a good and sufficient deed for the property which he had contracted to sell, because, under the will of his mother, the item of which we have quoted, his title to Milbourne Farm was not absolute, but defeasible. There was a limitation over as to the farm by way of an executory devise to John Glenn Townsend in the event of Irving S. Townsend dying without issue. It is, therefore, apparent that Irving S. Townsend could not execute a good and sufficient deed clear of all encumbrance of every kind as he was obligated by the contract to do. It is equally apparent, we think, upon the undisputed evidence that the appellant under the decree of the lower Court was not awarded what he in fact agreed to buy. The subject matter of the contract was not described in the memorandum of sale, but the evidence shows that what he was decreed to take is in a material respect different from that which he agreed to buy. This misunderstanding as to location and extent of the property was due to a misrepresentation no doubt innocently made by the vendor, who was not accurately informed as to the boundaries of the land. The principles to be applied to this state of facts are plain. "So far as this element of misrepresentation is concerned it is sufficient to defeat a specific performance, that the statement is actually untrue so as to mislead the party to whom it is made; the party making it need not know of its falsity, nor have any intent to deceive; nor does his mere belief in its truth make any difference. With respect to its effect

upon the specific performance of the contract, a party making a statement as true, for the purpose of influencing the conduct of the other party, is bound to know that it is true. In maintaining the defense to a suit for specific performance, the knowledge, belief, or intent of the party making the representation is wholly immaterial, and the question is not raised. The point upon which the defense turns, is the *fact* of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead. It follows, as a plain consequence of this general doctrine, that if a party makes a misrepresentation, whereby another is induced to enter into an agreement, he cannot escape from its effect by alleging his forgetfulness at the time of the actual facts." *Pomeroy on Contracts*, 2nd Ed., sec. 217.

Parol evidence may always be resorted to for the purpose of explaining the position of the parties and of the subject matter and other surrounding circumstances at the time of concluding the contract, so that the Court may be put into the position of the parties, may see with their eyes, and may understand the force and application of the language employed by them. In this manner the subject matter may always, as in the interpretation of a will or a deed, be ascertained and identified. For example, a contract by which the vendor agreed to sell "my mill," or even "the mill" would be made sufficiently certain, and the subject matter clearly identified, by proof that at the time the vendor owned a mill and but one mill. Such a description would then be as unmistakable as a most elaborate method of fixing and locating the structure. *Pomeroy on Contracts*, 2nd Ed., sec. 161.

Upon the testimony in this record we do not think that there can be a doubt about the fact that the appellant was misled in an important and material matter by the statements made to him by Mr. Townsend as to the boundaries of the farm.

Md.]

Opinion of the Court.

In *Gurley v. Hiteshue*, 5 Gill, 223, it is said that the object in every suit for specific performance of a contract "is to carry into full effect, the exact objects and intentions of the parties, on the ground that where an honest and fair contract has been entered into by parties competent to engage without imposition or malpractice on either side, no advantage should be taken by either of any subsequent change of circumstances or of opinion which might alter, or be supposed to alter, the benefit resulting to the parties respectively. A Court of Equity, professing as it does to lend its aid exclusively to cases in which a claim can be conscientiously enforced, will never coerce the specific performance of a contract for a party who has not acted fairly, openly and without suppression of any important fact, or the expression of any falsehood. Whether with a fraudulent design or innocently, yet if a false impression has been conveyed and made the basis of the contract, this extraordinary jurisdiction of the Court will not be exercised by coercing a specific performance." In a suit by the vendor for the specific performance of a contract parol evidence is permissible to show that the contract was induced by fraud, mistake, or misrepresentation. *Balto. Permanent B. & L. Soc. v. Smith*, 54 Md. 202.

In *Dixon v. Dixon*, 92 Md. 442, JUDGE MCSHERRY, after quoting with approval the language of VICE CHANCELLOR EMERY of New Jersey, in *N. Y. Life Ins. Co. v. Gilhooley*, 47 At. Reporter, 494, that "a purchaser in resisting a claim for specific performance of the contract, is entitled to show, by parol evidence or otherwise, circumstances making it unconscionable or unjust to grant this relief, which is purely equitable and which entitles him to insist that the vendor be left his remedy at law on the contract," said: "It may well be that there is a binding contract, but if it has been entered into under conditions not affecting its validity though of such a character as to indicate that it would be inequitable to specifically enforce it, a case would be made where a Court

Syllabus.

[114]

of Equity would not only be justified in leaving the complaining party to his remedy at law, but where a proper exercise of the admitted discretion, with which the Court is clothed in such cases, would be rightly exerted by denying the specific relief sought under the bill. This means "not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another; but that the Court has regard to the conduct of the plaintiff and *to circumstances outside the contract itself*, and the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor."

The memorandum of purchase, which we have quoted, entitled the appellant to take immediate possession of the farm. He has been ready and willing to perform all his obligations under the contract, and has done no act to waive his rights thereunder.

It follows that the decree appealed from must be reversed and the bill dismissed.

Decree reversed and bill dismissed with costs.

THE GERMAN UNION FIRE INSURANCE COMPANY *vs.* ISIDOR COHEN.

Appeal—Fire Insurance—Misrepresentation as to Ownership of Part of Property Covered by Household Furniture Clause—What Constitutes False Swearing Avoiding the Policy.

An appeal will not be dismissed merely because the appellant failed to pay the cost of printing the record within ten days after receipt of notice from the Clerk of the Court of Appeals, as is required by Rule 34, if the record was in fact printed and ready when the cause was called for argument in regular order.

Md.]

Syllabus.

A policy of fire insurance was issued to the plaintiff on household furniture, wearing apparel of family, sewing machine, etc. The policy provided that it should be void if the insured had concealed or misrepresented any material fact concerning the insurance, or if the interest of the insured in the property be not duly stated, or if the interest of the insured be other than unconditional and sole ownership. *Held*, that the fact that the sewing machine and certain clothing, covered by the general terms of the policy, did not belong to the plaintiff, but to his wife, is not such a misrepresentation of ownership as renders the entire policy void.

In plaintiff's proof of loss, verified by affidavit, he stated that among the articles injured by fire of which he was the owner were certain pieces of women's clothing and a sewing machine. At the trial of the cause, he stated that he had given to his wife the money to buy the sewing machine. *Held*, that this affidavit does not avoid the policy under a clause in it providing that in case of any fraud or false swearing by the insured, touching any matter relating to the insurance, whether before or after loss, the policy should be void

Under a provision of a policy of fire insurance stating that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, a misstatement under oath as to the ownership of part of the property insured does not avoid the policy when it was not believed by the insured to be false and was not made with the intent to defraud.

Decided November 30th, 1910.

Appeal from the Court of Common Pleas of Baltimore City (HEUISLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

George A. Finch, for the appellant.

Myer Rosenbush, for the appellee.

Opinion of the Court.

[114]

PATTISON, J., delivered the opinion of the Court.

A motion to dismiss this appeal has been filed in this case upon the ground that the costs of printing the transcript of the record were not paid by the appellant or his counsel within the ten days from the receipt of the notice from the clerk of this Court stating the amount for printing the same, as provided by Rule 34 of this Court. A failure to comply with said rule does not authorize the dismissal of the appeal for such default. *Harre de Grace v. Fletcher*, 112 Md. 563. The motion to dismiss, therefore, must be overruled.

This action was brought by the appellee against the appellant company, upon a policy of insurance, to recover for loss and damage by fire to certain property alleged by the appellee to have been covered by said policy of insurance.

The appellee on the 14th day of December, 1908, took out, with the German Union Fire Insurance Company, the appellant, a policy of insurance for five hundred dollars covering certain household furniture and effects at the time in the house then occupied by the appellee as a residence at 206 South Eden street, Baltimore, Maryland. This policy contained what is known as the Household Furniture Form, which is as follows:

"\$500. On Household Furniture, useful and ornamental. Beds, Bedding, Linen, *Wearing Apparel of family*, Printed Books, Pictures, Paintings, Engravings and their frames (value on said Pictures, Paintings, Engravings and their Frames, in case of loss, not to exceed cost). Musical Instruments, Plate and Plated Ware, China, Glass and Crockery Ware, Watches and Jewelry in use, *Sewing Machines*, Fuel and Family Stores, while contained in the three story, tin roof, brick dwelling, situate No. 206 South Eden Street, Baltimore, Md."

On the 4th day of July, 1909, this property, while then in the house on Eden street occupied by the appellee, was destroyed or damaged by fire, and on the 17th day of July following, the appellee, through his attorneys, wrote the com-

Md.]

Opinion of the Court.

pany enclosing them a proof of loss; at the same time offering to furnish such other and additional data that might be required of him, in his power to furnish.

Demand was made by the insured upon the company for the payment of the loss and damage sustained by the appellee by reason of such fire, but the appellant company refused to pay the claim and based their refusal solely upon the alleged fact that the property at the time of the destruction or damage by fire was not located in the place mentioned in the policy of insurance, but had been removed therefrom without notice to or the approval of the company. It was for this reason, and for this reason alone, as disclosed by the evidence, that the appellant company, prior to the institution of this suit, resisted the payment of this claim. The contention arose from the apparent discrepancy existing between the furniture clause heretofore referred to and an endorsement placed thereon by the company as to the location of the property. This question, however, was properly presented to the jury for its consideration by the conceded fifth prayer of the defendant and was passed upon and disposed of by it, and is, therefore, not before us for our consideration.

Upon the failure of the appellant company to pay the claim of the appellee, suit was thereafter instituted upon the policy of insurance, and at the conclusion of the plaintiff's testimony in the trial below the defendant offered four prayers, all of which were refused, and at the conclusion of the whole testimony these four prayers were again offered as defendant's first, second, third and fourth prayers, together with six others, all of which were refused except the fifth prayer, which was conceded.

The record contains but three exceptions to the rulings of the Court; one to the admission of testimony; another to the rejection of the prayers of the defendant offered at the conclusion of the plaintiff's case; and the third to the rejection of the defendant's 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and

10th prayers, and the granting of the plaintiff's 1st and 5th prayers.

The policy of insurance contains this clause: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss * * * or if the interest of the insured be other than unconditional and sole ownership."

It is contended by the appellant company that the policy was rendered void, first: because of the want of insurable interest in the insured in certain of the property mentioned in the household furniture form or clause of the policy, to wit: sewing machine and wife's clothing, and that the appearance of these articles among the articles insured in the policy was a misrepresentation of ownership such as to render the policy void. Second, because of the alleged false swearing of the appellee in relation to the proof of loss in which he inserted these items of property destroyed or damaged by fire as belonging to him or in which he had an insurable interest.

The household furniture clause attached to the policy is in the form of a printed slip containing the names of the articles or class of articles to be covered by the policy, and is generally, if not always, attached to all policies of insurance issued by the company wherein household furniture and effects are insured, unless it is the wish of the applicant for insurance that the description of the property be less general and comprehensive and that only such items or articles of his property, or property in which he has an insurable interest be inserted in the policy as may be specifically enumerated by him.

Md.]

Opinion of the Court.

In the use of this form the company does not call upon the applicant to name specifically the property owned by him and which he wishes to insure, but in lieu thereof and for its own convenience adopts this form or clause, which is sufficiently broad and comprehensive to embrace all articles of furniture and household effects usually found in any dwelling house. This form is used even though it embraces many articles not sought by the applicant to be insured, and therefore it follows that from the mere mention of them in this form upon the policy there can be, as to such articles, no representation on the part of the applicant either as to their existence or ownership; and it cannot be said that the applicant has made a misrepresentation as to such articles should it thereafter be discovered that at the time of the issuance of the policy some one or more of them were not among the property insured, or, if so, were not the property of the applicant. Moreover, the objection as to the want of insurable interest of the husband in the clothing of the wife cannot be successfully made in this case, inasmuch as by the terms of the policy the wearing apparel of the family is expressly included within the property insured. This we think disposes of the first contention of the appellant.

The amount of loss or damage sustained by the appellee, as shown by the proof of loss, was five hundred and nine dollars. In this proof of loss, to which was attached the affidavit of the insured, in which, among other things, he stated that he was the owner of the items therein given, said to have been destroyed or damaged by fire, were the following items: one ladies' fur jacket, \$50, one lot of ladies' clothes, \$30, damage to one ladies' sewing machine, \$5.

The plaintiff when upon the stand and upon cross-examination testified as to the cost, age and amount yet owing upon the machine, and that it was bought under an agreement to pay so much each month on the purchase price thereof, and when asked "Who bought that machine, you or your wife," stated that "The agent came down and she took the

machine. Q. Was there any agreement signed by your wife as far as you know with the machine company as to this machine? A. I guess she signed. Q. Did you sign any paper? A. No, sir. Q. You have sworn (referring to the oath attached to the proof of loss) to the fact that the property destroyed by fire was your own? A. Yes, sir. Q. And now you testify that the machine belonged to your wife? A. Ain't my wife my own? Don't my wife belong to me?" Later, in his re-direct examination, he was asked, "You have been asked about your wife's connection with the machine. What, if anything, did your wife have to do with buying this machine?" The defendant objected to this question but his objections were overruled by the Court, and it is this ruling that forms the first bill of exceptions in this case. The witness being permitted to answer, said: "She needed the machine to sew up some waists and I told her to get a machine and she wanted to get a machine and when I came home I found the machine and she made a contract, she told me. I gave her the money and she got it with the money."

The witness having testified upon cross-examination in relation to the purchase and ownership of this machine as given above, we see no objection to this question and think the Court properly ruled in admitting the answer thereto. But, should the Court have been wrong in this ruling, there was no reversible error, inasmuch as there was no injury resulting therefrom to the defendant, as the plaintiff thereafter withdrew all claim for damage to the machine and the same was not considered by the jury.

It is upon the affidavit made by the plaintiff to the proof of loss in relation to the ownership of the property mentioned therein, considered in connection with the testimony of the plaintiff given in relation to the ownership of the machine and wife's clothing, mentioned in said proof of loss, that the charge of false swearing by the plaintiff is based, and by reason of which the defendant contends this policy is rendered void.

Md.]

Opinion of the Court.

In general, a misstatement, although under oath, if not intentionally false and made with a purpose to defraud, does not constitute such false swearing as to defeat recovery under a provision in the policy that any fraud or false swearing by the insured relating to the loss or in the proof of loss will forfeit his right of recovery under the policy." 19 *Cyc.* 855.

"To constitute fraud or false swearing the false statement must be wilfully made with respect to a material matter with the intention of thereby deceiving the insurer." *Amer. & Eng. Ency. of Law*, 1st Ed., Vol. 7, page 1047.

"A frequent provision is that any fraud or false swearing by the insured shall forfeit the insurance. This means intentional fraud and false swearing regarding a material matter." *Amer. & Eng. Ency. of Law*, 1st Ed., Vol. 11, page 301.

Before the policy could be rendered void by the alleged false swearing of the defendant, which consists of the statement made by him, under oath, that the articles of property named in the proof of loss, to wit: the sewing machine and wife's clothing, was his property, it must first be shown that the statement was false and was wilfully made and for the purpose to defraud. To have constituted false swearing within the meaning of the contract of insurance, so as to have rendered the policy void, the statement so made must not only have been untrue, but that it was knowingly and intentionally stated with the knowledge of its untruthfulness, or that it was so stated as a truth when the party did not know it to be true and had no reasonable grounds for believing it to be true, and was so made with the purpose to defraud.

It was through the defendant that the disclosure was made that the contract or agreement for the purchase of this machine was made by the wife. The evidence shows no reluctance on his part in making a free, clear and full statement of the facts in relation to its ownership or by whom it was bought. Through him it was first learned that there was a

written agreement and that it had not been signed by him, and when asked why he had stated, under oath, in the proof of loss, that the property was his when he had knowledge that it had been purchased by his wife from the company under a written agreement between her and the company, he replied by saying "Ain't my wife my own? Don't my wife belong to me," and further stating that he had told her to get the machine and had given to her the money with which to get it.

From the record in this case we discover no evidence from which it may be said that the statement made under oath by the plaintiff as to the ownership of this property, if a misstatement, was wilfully and intentionally made and with the intention to deceive or defraud. By the express terms of the policy the wife's clothing was clearly included within the property insured, and if the machine was not so included, the claim for damage thereto was thereafter withdrawn from the consideration of the jury and no injury whatever was suffered by the defendant in consequence of the said alleged misstatement made by the plaintiff. We therefore think this disposes of the second contention of the defendant.

As the defendant proceeded with its testimony after the rejection of its prayers offered at the conclusion of the plaintiff's case, it waived its exception presented by the second bill and therefore it cannot be considered by us—*Baltimore & Ohio R. R. Co. v. Logsdon*, 101 Md. 362; but it renewed these prayers at the end of the testimony and they will now be considered with the other prayers then offered under the exception presented by the third bill.

In view of what we have said as to the contentions of the defendant, we find no error in the ruling of the Court in rejecting defendant's 1st, 2nd, 3rd, 8th, 9th and 10th prayers, as they were predicated upon these contentions and dependent upon the correctness of the same.

Md.]

Opinion of the Court.

The fourth prayer of the defendant was clearly erroneous, as it withholds from the jury facts that should have been determined and passed upon by it.

We think the plaintiff's fifth prayer correctly states the rule of damages applicable to this case and that there was no error in the Court in rejecting defendant's sixth prayer on the measure of damages.

By the seventh prayer of the defendant, the Court was asked to instruct the jury that "if the jury shall find from the evidence that no premium was paid for the issuance of the policy to the defendant or its agents, the amount mentioned in the policy, then their verdict shall be for the defendant." In view of the admission of the defendant company of the payment of the premium and their offer contained in their notice of cancellation that they would repay the unearned portion of the premium upon proper demand and surrender of the policy, and in the absence of any evidence in support of its non-payment, the Court in our opinion, committed no error in rejecting this prayer. Nor do we find any error in the ruling of the Court in granting the plaintiff's first prayer, as it correctly states the law of the case.

Finding no errors in the rulings of the Court below the judgment will be affirmed.

Judgment affirmed, with costs to the Appellee.

CONSOLIDATED GAS COMPANY vs. GEORGE L.
CONNOR—THE SAME vs. ELIZABETH
GOODMAN.

*Liability of Gas Company for Injury Caused by Escape of Gas
from Street Lamp Owned by City.*

When, in carrying out its contract with a city to supply gas to city lamps, a gas company distributes the gas through defective pipes, under its control and which it was bound to inspect and repair, and thus permits the gas to escape into streets and houses, the company is liable to anyone who may suffer injury in consequence of its failure to exercise due care to keep the pipes in repair and to discover leaks therein.

The defendant gas company, by its contract with the municipality of Baltimore, agreed to supply gas to street lamps owned by the city and to make connections by means of service pipes from its main pipes to the lamps, the city agreeing to pay a certain sum for each new lamp connected with the main. The contract did not expressly require the gas company to repair the service pipes, but both parties treated the duty to do so as devolving on the company. Whether the service pipes were owned by the city or by the company is not clearly shown. Plaintiffs were made ill by an escape of gas from a city lamp placed in front of the house they occupied, and brought these actions against the gas company to recover damages therefor. For three or four days prior to the injury a constantly increasing odor of gas was perceived in the street, and the lamp referred to could not be lighted. The gas company was notified, and its employees examined the locality without discovering the leak. After the injury to the plaintiffs, these employees dug up the soil at the base of the lamp-post, and discovered the leak in the fitting which joined the horizontal pipe laid from the main to the lamp-post with the vertical pipe rising up through the interior of

Md.]

Statement of the Case.

the post. *Held*, that whether the service pipe belonged to the city or not, it was the duty of the gas company to see that it was kept in repair.

Held, further, that the evidence was legally sufficient to show that the defendant company was negligent in failing to discover and repair the leak in the pipe, and that it was for the jury to say as matter of fact whether the examination made by it which failed to discover the leak was a due examination.

Held, further, that although in supplying gas the company was acting under a contract with the city, it is liable to third persons for its misfeasance in the performance of that duty by which injury was occasioned.

The declaration in this case charged that the defendant was negligent in failing to repair its pipes. The jury was instructed that they might render a verdict for the plaintiff if they found that by reason of its failure to use due care, the gas supplied by the defendant leaked or escaped from its pipes or from pipes which in the operation of its business it used and assumed the duty of repairing. *Held*, that the declaration is sufficient to cover both the theory of ownership of pipes by the city and the theory of the defendant's assumption of their control and repair.

Decided November 16th, 1910.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.). In the suit by the appellee Connor there was a judgment on verdict for the plaintiff for \$350. In the suit by the appellee Goodman there was a judgment on verdict for the plaintiff for \$1,000.

Plaintiffs' 2nd Prayer.—That it is the duty of the defendant to exercise such care in the inspection and control of its pipes and in the operation of its business and in the inspection and control of pipes which, in the operation of its business, it uses and assumes the duty of repairing, as would be used by persons of ordinary care in similar business, or in

the business of manufacturing and handling of similarly dangerous substance. And if the jury find that by reason of its failure to use such care the gas of the defendant leaked or escaped from its pipes or from pipes, which in the operation of its business it used and assumed the duty of repairing, outside the house and premises occupied by the plaintiffs into the cellar and other parts of said house and premises and that the plaintiffs, whilst sleeping in their bedroom on the second floor of said premises, were injured by inhaling said gas, then the plaintiffs are entitled to recover; unless the jury find that the acts of the plaintiffs on such occasion in going to sleep in said bedroom, under all the circumstances, were such as persons of ordinary care would not have done under said circumstances. (*Granted.*)

The cause was argued before BOYD, C. J. BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Vernon Cook (with whom were *Gans & Haman* on the brief), for the appellant.

The lower Court permitted the case to go to the jury upon two alternative theories, as shown by the plaintiffs' second prayer, which was granted. The theory of this prayer is that the Gas Company was bound to exercise due care in the inspection and control of pipes owned by it, and of pipes which were not owned by it, but which it used and assumed the duty of repairing, and the jury were told that if they found that the company failed to use such care, either as to its own pipes or as to pipes which it used and assumed the duty of repairing, that then if there was no contributory negligence, they should find in favor of the plaintiffs.

This instruction assumes three things:

1. That there was evidence from which the jury might find that the Gas Company owned the pipe in which the leak occurred.

Md.]

Argument of Counsel.

2. That even if the jury did not find such ownership in the Gas Company, yet if they found that the Gas Company, as between itself and the City, had assumed to keep this service pipe in order, that this contractual relation made the Gas Company liable directly to the plaintiffs for its failure to carry out its contract with the City.

3. That there was evidence of negligence on the part of the Gas Company in not maintaining pipes of one class or the other in proper condition.

In all three of the points above mentioned, we contend there was error.

The Court below, we think properly enough, refused to permit witnesses on either side to answer the direct question as to ownership, and ruled that they might state any facts within their knowledge tending to throw light upon the same, but that they should not answer the direct question, because such an answer would be either a mere opinion, or the view of the witness as to the law.

The uncontradicted evidence is that these pipes are furnished by the Gas Company upon the order of the City for the use of the City in connection with a City lamp post established under City ordinances, for the purpose of lighting the City streets. The labor and material used in this connection is charged against the City. The company never claimed to own such service pipes. The City, while it now contends that it does not own these pipes, has nevertheless, by the uncontradicted evidence, through a long series of years, practically admitted such ownership by reason of the fact that it has, from time to time, given the Gas Company orders in reference to the removal, cutting off or repairing of such pipes, and that it has always recognized its liability to the company for work done by the company on or in connection with such pipes. This appears from the testimony of the witnesses, also from the contracts and bills offered in evidence. If these pipes belong to the Gas Company, on what possible theory should the City have paid for the repair of

one of such pipes when it was broken or damaged? In the Record will be found specific instances where under the contract in force at the time of the accident in this case, the Gas Company repaired broken lamp services and rendered bills therefor to the City, which bills were paid without question. These bills in each case specifically show that certain fittings were charged to the City in each case, and other evidence shows that an "L," such as that broken in the present case, is one of the fittings that goes into every lamp post.

The evidence was all one way as to the ownership of the service pipes. We use this expression "service pipes" in its broadest sense, including the horizontal pipes from the main to the post, the vertical pipe inside the post, and the "L" connecting the two. If anything, our position is even stronger in the case of the "L" and the riser than in the case of the service pipe proper. The two latter are inside of and attached to the lamp pillar, which it is conceded belongs to the City, and under the application of the familiar doctrine of accession, the title to the riser, the "L," and service pipe would follow the title to the lamp pillar or post, which is the principal thing. 1 *Am. & Eng. Encyc.*, 248: "It is a generally recognized rule of property that a product which results from the combination of the materials of several individuals belongs to the one who contributes the principal element."

The principal element in this case is the lamp pillar, the property of the City, the value of which obviously far exceeds the cost of the pipe, shown to be sixty cents, and the cost of the "L," five cents.

It is a familiar principle that if A. owes a duty to B., and A. by contract agrees with X. that X. shall do whatever is necessary to perform such duty, B. not being a party to this contract, and if X. then fails to carry out his contract with A., that in such case B. has no right of action directly against X., but must look to A., and A. must, in turn, if the facts warrant it, bring a suit against X.

Md.]

Argument of Counsel.

Applying this to the present case, we submit that under the ordinances offered in evidence, it is entirely clear that the primary duty with regard to keeping lamp posts and their appurtenances in repair is upon the City, and even if it be conceded, for the sake of the argument, that by some contract or course of dealing the Gas Company has undertaken, as between itself and the City, to keep these service pipes in repair, and even if it be further conceded, for the sake of the argument, that the Gas Company failed to carry out such contract, and failed to keep this particular pipe in repair, whereby there was a leak causing injury to the plaintiffs, then it is clear, under all the authorities, that the plaintiffs' remedy is against the City as the one primarily liable, and not against the agent of the City, to whom the City has undertaken to delegate this work. *Hand v. Evans*, 88 Md. 229; *Eastern Adv. Co. v. McGaw*, 89 Md. 86; *Lampert v. La Clede Gas Co.*, 7 Western Rep. 745; *Nickerson v. Bridgeport*, 46 Conn. 24; *Atkinson v. New Castle*, L. R. 2 Exch. Div. 441; *Davis v. Clinton*, 54 Ia. 59.

In this case if there is any neglect to be ascribed to the Gas Company, it is at most nonfeasance, and not misfeasance. The only thing that can be said in criticism of the company is that it did not find the leak. It is not shown or claimed that it did anything to make the situation worse than it would have been had the company's employees paid no attention whatever to the post on Hakesley Place. Illustrating nonfeasance and misfeasance, as applied to the circumstances of this case, it is clear that if the Gas Company had paid no attention to the notices of the leak, and sent nobody to Hakesley Place, that would have been mere nonfeasance with no liability. If, on the other hand, they had sent a man to search for the leak, and he, finding a considerable escape of gas, had carelessly and negligently searched for this leak with a lighted match or candle, and caused an explosion, injuring the plaintiffs, this would have been misfeasance. The facts in this case are that the company sent three men to search

for a reported leak. They did search for it in the usual way. They did not find it. They did nothing to aggravate the situation. The harshest criticism that could be made of them is that they did not find the leak—that is, that they did not do what it is claimed the company has agreed to do. This is nonfeasance, and not misfeasance. *Sherman & Redfield, Negligence*, secs. 243-244.

Even if we assume, for the sake of this branch of the argument, that the broken pipe belonged to the company, or was one that they had assumed to keep in repair, and that a failure to keep the same in repair gave the plaintiff a right of action directly against the defendant, yet we still contend that the defendant was not guilty of negligence. The mere fact of a leak in the gas pipe is not of itself negligence under the previous decisions of this Court. *Brady v. Consolidated Gas Co.*, 85 Md. 642; *Consolidated Gas Co. v. Crocker*, 82 Md. 124. In the *Brady* case just cited the Court, speaking of a failure to stop a leak of gas, says: "This is not a case in which negligence may be inferred from the occurrence of the injury."

The contention of the plaintiffs will be that after the company was notified of this leak, that its men who visited Hakesley Place on the following day were guilty of negligence in not locating the leak. This conclusion we submit is not justified by the evidence. Of the three men who visited Hakesley Place, one is dead, one had left the City, and the third testified. His testimony instead of showing negligence, on the contrary shows that he and his associates did everything that reasonably could have been expected under the circumstances. The Gas Company sent not one man, but three. The search for the leak was made not by one man, but by three. They all agreed at the time they were there that there was no leak. The lamplighter, who happened to be present, agreed with them. They all searched for the leak, and no leak was found. What more could they have done at that time than they did do? The

Md.]

Argument of Counsel.

evidence does not disclose that there was anything further which they could have done. They used reasonable diligence and the company certainly used reasonable diligence in sending three men to check up each other's work. No further report of a leak came to the company until after the injury to the plaintiffs.

It is entirely immaterial, for the purposes of this case, whether the company's leak gang consisted of one hundred men or only the three men in question. There is no causal connection between the alleged failure to have sufficient men in the leak gang and the plaintiffs' injuries.

Isaac Lobe Straus and *Wm. Pinkney Whyte, Jr.*, for the appellees.

The record is replete with proof that the Gas Company was grossly negligent in many respects in the maintenance, inspection and control of its pipes, plant and gas, and in the operation of its business, and that said negligence was the efficient proximate cause of the injuries to the plaintiffs.

The testimony of a number of witnesses showed that the gas had escaped and was noticed in the street as early as Tuesday morning, four days before it injured the plaintiffs in the bedroom of their home. The proof showed further that the Gas Company has assumed the duty of locating and remedying leaks of gas. The evidence is also abundantly to the effect that the gas constantly and steadily increased in the street from Tuesday until Friday night and Saturday morning. The Gas Company, according to the undisputed evidence, did not stop the escape of gas, as it should have done, until after the injury to the plaintiffs. It is, moreover, undisputed that it was the gas of the defendant, so allowed to escape and accumulate for four days, which injured the plaintiffs.

The Gas Company was notified on or before Wednesday of the leak. The evidence establishes that they had such notice, and it is clear beyond doubt that they did have it.

because, as the proof shows, they sent their leak gang to the vicinity on Wednesday, several days before the injury. These men, the employees of the company, went to Hakesley Place, to the lamp post in question, and although everybody else in the neighborhood smelt the gas abounding in the street, these employees failed to find the cause of its escape or to correct and repair it. In this connection, the proof also discloses that the men stayed there about twenty minutes, and that they made only a superficial and perfunctory examination. They did not use the instruments on Wednesday as they used them on Saturday, according to their own testimony, to locate any leak beneath the pavement. The examination which they made was on its face, according to their own testimony, an indifferent, careless and negligent one.

The proof shows that in Baltimore City the Gas Company had some four hundred and fifty-five miles of mains, and also seventy-nine thousand service pipes, and also under the law a monopoly in the gas business, and that, nevertheless the company kept only four or six men engaged in the work of locating and repairing leaks. When one considers the poisonous and fatal qualities of the gas which this company was thus handling, the numerous population of the city, densely and thickly settled, upon a comparatively limited territory, and the fact that there were four hundred and fifty miles of mains, some 79,000 service pipes and other ramifications of their plant and system through which this poisonous and fatal agency was carried and distributed, it was certainly negligence of the gravest sort for the company to maintain but from four to six men for the inspection of this plant and the discovery, location and repair of leaks.

That the gas is dangerous, explosive, poisonous and fatal and that the company knew it, is admitted. To permit such a condition as is above described to exist without prompt remedy, is negligence. *Consol. Gas. Co. v. Croker*, 82 Md. 113; *Consol. Gas Co. v. Getty*, 96 Md. 683; *Brady v. Gas Co.*, 85 Md. 637; *Mose v. Hastings Gas Co.*, 4 F. & F. 324; *Koelsch v.*

Md.]

Argument of Counsel.

Gas Co., 152 Pa. St. 355; *Gas Co. v. Baker*, 146 Indiana, 600; *Smith v. Gaslight Co.*, 129 Mass. 318; *Finnegan v. Gas Works*, 159 Mass. 312; *Hunt v. Gas Co.*, 3 Allen, 418; *Emerson v. Gas Co.*, 3 Allen, 410; *Butcher v. Gas Co.*, 12 R. I. 149; *Chisholm v. Gas. Co.*, 57 Ga. 28; *Ray's Negligence Imposed Duties*, 145; *Whitaker-Smith on Negligence*, 423-428; 234-6; 20 Cyc. 1170; *Sherman and Redfield on Negligence*, secs. 697-692; *Thompson's Negligence*, sec. 11, page 108.

After the accident, it will be noted, the defendant's employees ran their rods into the earth and discovered the leak. Why did they not do this or something of the kind on Wednesday before the accident? The proof shows that they stayed there a most limited time—only about twenty minutes. They said they only smelt about the lamp and did nothing more and they discovered nothing, while a dozen witnesses, residents of the neighborhood, testified to the strong effects on that same day of the liberated gas in the street. The accounts given by the company's employees of what they did, are exceedingly vague and unsatisfactory. Failure to make proper inspections of a plant carrying agencies dangerous to life and property is negligence. On reasonable inspection see *Koelsch v. Phila. Co.*, 152 Pa. St. 355; *Mose v. Hastings, Etc.*, 4 Fos. & F. 324; *Holly v. Boston Gas Lt. Co.*, 8 Gray, 123; *Crawford v. United Rys.*, 101 Md. 402.

Escape of gas in public streets unless explained in *prima facie* evidence of negligence. *Smith v. Boston Gaslight Co.*, 129 Mass. 318; *Crocker's Case*, 82 Md. 113; *Getty's Case*, 96 Md. 683; *Crawford v. United Rys.*, 101 Md. 402, 417-18.

When the company confessedly received notice that there was a serious leak in the vicinity of the house that was afterwards damaged, did it use due and reasonable diligence to prevent it; if it did not, then it was guilty of negligence; if it did, then it was not guilty of any negligence. Whether it did or did not use due and reasonable diligence to locate the

leak was a question of fact for the jury in the circumstances of this case. *Getty v. Gas Co.*, 96 Md. 688.

The record is full of proof that the Gas Company owned the pipe from which the gas which injured the plaintiff escaped; and as against this cumulative proof of the company's ownership of the said pipe, there is, in effect, no proof that the company did not own the pipe, the attempt of the company to prove that they did not own the pipe having been unavailing and futile.

The evidence in the case shows particularly, that the defendant in the operation of its business had appropriated and adopted the pipe from which the gas which injured the plaintiffs escaped, as a part of its plant and system of mains, pipes and conduits, referred to in the declaration and justified the Court in granting the second instruction for the plaintiffs. *Comm. v. Lowell Gas Co.*, 12 Allen, 77; *Washington Gas. Co. v. D. C.*, 161 U. S. 316.

URNER, J., delivered the opinion of the Court.

The two appeals embraced in this record were taken from judgments recovered by the appellees in separate suits against the appellant for personal injuries resulting from the inhaling of gas which was alleged to have escaped from the appellant's pipes through its negligence. As the causes of action were practically identical the cases, by agreement, were tried together in the Court below.

The appellees, Elizabeth Goodman, formerly Connor, and her minor son, George L. Connor, lived at the corner of Hakesley street and Bond Street alley, in Baltimore City. At this corner there was a city lamp which was supplied with gas by the appellant under a contract with the municipality. While the appellees were asleep at night, in a room on the second floor of their dwelling, they were made ill by gas which escaped from a leak in the service pipe connecting the city lamp with the appellant's main. Subsequent investigation located the leak in the fitting, called an "L."

Md.]

Opinion of the Court.

which joined the horizontal pipe, laid from the main to the base of the lamp-post, with the vertical pipe, or "riser," extending upwards, through the interior of the post, to the burner.

The only rulings of the Court below presented for review are those disposing of the prayers offered by the respective parties, and the questions involved are: first, as to the legal sufficiency of the evidence to show negligence on the part of the appellant; secondly, as to the liability of the appellant for the consequences of the escape of gas from a pipe, the ownership of which it claims to have conclusively proven to be in the city of Baltimore; and thirdly, as to the responsibility of the appellant to third persons for alleged negligence under its contract with the city.

In connection with its contract to supply the city lamps with gas, the appellant, as the record shows, undertook the duty of keeping the service pipes in proper condition. Whenever leaks occurred the established practice was for notice to be given to the Gas Company through the office of the City Superintendent of Lamps and Lighting, and the company would make the necessary repairs. Independently, therefore, of any question of obligation on the part of the appellant to the appellees, the primary inquiry is whether the company was shown, by legally sufficient evidence, to have been negligent in the performance of the duty it assumed to keep in repair the pipes through which its gas was furnished to the city.

There is evidence in the record to the effect that three or four days before the night on which the appellees were injured, gas had been noticed in the street outside of their house; that the odor was slight at first, but grew stronger from day to day; that the street lamp was out all that week, and the lamplighter could not light it; that the Gas Company was notified, and on Wednesday, two days before the injury to the appellees, the company's employees visited the place and detected no odor of gas; that they made an unsuc-

cessful search for a leak by smelling at the burner, but made no investigation at or beneath the surface of the ground; and that on Saturday, the day after the injury was sustained, the employees of the company dug up the soil at the base of the lamp-post and discovered the leak at the point already described.

It has been held by this Court that it is "for the jury to say as a matter of fact, and, therefore, not for the Court to determine as a matter of law, whether an inspection which failed to discover what other persons in the same situation as was the inspector were aware of was a due and reasonable inspection." *Consolidated Gas Co. v. Getty*, 96 Md. 688. If the appellant's agents had made on Wednesday the kind of inspection they made on Saturday, there can be no doubt that the leak would have been discovered and repaired in time to avoid the injury to the appellees. It could not justly be held that an examination which is shown to have been as incomplete and ineffective as the one first made was sufficient to relieve the appellant from the imputation of negligence in the performance of so serious a duty as that of providing against the escape of the dangerous product it was engaged in distributing. It could not discharge that duty, as this Court has said, "by assuming without knowing that the leak proceeds from one source, when, in fact, it proceeds from a totally different source which could have been discovered by proper inspection." *Consolidated Gas Co. v. Crocker*, 82 Md. 124. The question of negligence was clearly one for the jury to determine under the circumstances shown by the record.

It was urged, however, on behalf of the appellant, that according to the uncontradicted evidence, the service pipe in which the leak was found belonged to the city, and that therefore, the appellant could not be held responsible for the escape of gas at that point.

By the contract under which the city lamps were supplied with gas, for the period covering the accident in question, it.

Md.]

Opinion of the Court.

was provided, among other things, that the appellant should make connection from its main pipes to such lamps as might be erected by the City along the lines of the mains; that the company should make such changes in the services supplying the lamps then in use, or which might thereafter be put in use, as might be requested by the City; that there should be paid by the City to the company the sum of five dollars for each new lamp connected by it to its mains, "this payment to cover the cost of laying the service and making the connection from the gas main to the lamp;" and that the City should pay to the company the "actual cost of making any changes or alterations in its services or connections to any street lamp" then or thereafter erected under the contract.

The situation, therefore, is one in which the City, owning the lamp-posts and lamps, arranged with the Gas Company to supply the lamps with gas. In order that this might be accomplished, it was necessary for the company to instal service pipes extending from the mains to the burners. The "cost of laying the service and making the connection" is stipulated to be paid by the City at a designed flat rate, but no provision is made for the transfer of title to the materials employed in the work. On the contrary, the retention of title in the company is suggested in the stipulation for the payment to the company of the cost of any changes in "its services or connections," made at the request of the City.

In the bills rendered by the company to the City for making new connections, the charge was merely "for connecting services to new gas lamps," at the flat rate per lamp prescribed by the agreement. The lamp-post here in question was connected with the main in October, 1908, and the bill for this and other connections for that month was: "for erecting new gas lamps" at the flat rate then in force. In none of the bills in the record for connecting the lamps with the mains is any mention made of the materials used for that purpose.

There is nothing in the contract expressly requiring the company to repair the service pipes, and yet that duty has been treated by both parties as devolving exclusively upon the company. The only payments shown by the evidence to have been made by the City to the company on account of repairs were in cases where lamp-posts, concededly the property of the City, had been broken off by a runaway team or other cause. When a lamp was removed to a different location the old service pipe was not taken up, but a new connection was made for which the City was charged at the contract rate. It was in evidence that the City always disclaimed ownership of the service pipes and that this was a disputed question between the municipality and the company.

There were other circumstances relied upon by the appellees as tending to show that the service pipes were not the property of the City, but those we have referred to are sufficient to make it apparent, at least, that ownership by the City was not so conclusively proven by the evidence as to justify the withdrawal of the case from the jury on that ground.

It does not appear, however, that this consideration is vital to the appellees' case. In view of the nature of the business in which the appellant is engaged it would, in our judgment, be unduly limiting its responsibility to hold that notwithstanding it should be found to have been neglectful of its duty to repair the service pipe in question, it should be exempted from liability to a third person for the injurious results of its negligence merely because the pipe might be shown to be the property of the municipality. The substance which the appellant manufactures and delivers to its consumers through its system of mains and connections is highly dangerous to persons and property, and the duty of the company is to use all reasonable precautions to confine this agency within the channels where it may be employed with safety and utility. As the current which the company sets

Md.]

Opinion of the Court.

in motion is sent through the entire extent of mains and service pipes which it has established for its own profit, and which it has undertaken to repair without reference to the technical question of ownership, it is only just that the measure of its liability to those affected by any negligence in this regard should equal that of its duty and opportunity to keep the system in repair.

In *Richmond Gas Co. v. Baker*, 146 Ind. 600, where the suit was for injuries sustained by an explosion of gas which escaped from a leak in an elbow connecting a conducting pipe with the plumbing of a dwelling house, it was said by the Court: "The company was supplying the house with artificial gas, a penetrating, elusive and explosive material, and hence one that was at anytime liable to become dangerous unless carefully guarded. The company, therefore, owed a duty to all persons who might be injured by the gas to use ordinary and adequate care in delivering the substance into the residence in question."

In *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, where the District was suing for reimbursement from the Gas Company on account of damages which the former had been compelled to pay a pedestrain for injuries sustained by reason of a gas box in a sidewalk being out of repair, the Supreme Court, in enforcing the liability of the company for neglect of duty in reference to the repair of the box, said: "Nor do we think that this duty was affected by the circumstances that the cost of the labor and material used in the construction of the connection and gas box was paid by an occupant or owner of property who desired to be furnished with gas. As the service pipe and stopcock was a part of the apparatus of the company and was used for the purpose of its business, it is entirely immaterial who paid the cost or might in law, on the cessation of the use of the service pipe and gas box by the company, be regarded as the owner of the mere materials. Certainly, it would not be claimed that if the box and its connections be-

came so defective or out of repair that gas escaped therefrom, and caused injury, the company could legally assert that it was under no obligation to take care of the apparatus, because of the circumstance that it had been compensated by others for its outlay in the construction of the receptacles from which the gas had escaped."

In the present case the duty of the company to make the necessary repairs to the pipe in which the leak occurred was clear and exclusive, and there was evidence from which negligence in the performance of that duty was inferable. Under these circumstances the company would not be exempt from responsibility to those suffering from such neglect even though the ownership of the service pipe had been conclusively shown to have been in the City.

But it is insisted that the company was, in this connection, operating as the agent of the City under a contract for the illumination of the City streets, and that while it may have assumed the duty of keeping the service pipes in repair, yet that was a duty which it owed solely to the City, and any neglect to perform it could be regarded only as a nonfeasance for which the company would not be liable to third persons. The appellant concedes that it would be liable to anyone injured by its *misfeasance* while acting as the agent of the City, but it contends that any negligence which might be found in this case consisted only of a failure to do that which was undertaken to be done, and amounted, therefore only to *nonfeasance*.

The distinction between these two classes of negligence has been frequently considered, and it is well settled that nonfeasance is the non-performance of a duty, for which the agent is liable only to his principal, while misfeasance is the improper performance of a duty, for which the agent is liable to third persons injured by such negligence. If, for example, the Gas Company in this case had failed to supply gas to the City lamps in accordance with its contract, this would have been a nonfeasance, for which the company would

Md.]

Opinion of the Court.

have been responsible only to the City. But when, in carrying out the contract, it distributes the gas through defective pipes and thus permits it to escape into the streets and houses of the City, there is manifestly involved an affirmative element of negligence amounting to misfeasance, and for this the company is liable to anyone who may suffer in consequence.

The Supreme Judicial Court of Massachusetts, in *Osborne v. Morgan*, 130 Mass. 102, has clearly stated the distinction as follows: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." It was accordingly held that "negligence and unskilfulness in the management of inflammable gas, by reason of which it escapes and causes injury," could not be regarded as mere nonfeasance.

This general principle is recognized in numerous authorities including *Mechem on Agency*, sec. 572; 31 *Cyc.* 1560; *Illinois Central R. R. Co. v. Foulke*, 191 Ill. 57; *Ellis v. McNaughton*, 76 Mich. 237; *Bell v. Josselyn*, 3 Gray, 309; *Southern Ry. Co. v. Grizzle*, 124 Ga. 735.

The cases cited by the appellant upon this point were instances of nonfeasance. In *Nickerson v. Bridgeport*, 46

Conn. 24; *Atkinson v. New Castle*, L. R. 2 Exch. Div. 441; and *Davis v. Clinton*, 54 Ia. 59, no recovery was permitted from water companies, at the suit of third persons, for loss by fire resulting from the failure to supply water to the municipalities with which they had contracted for that purpose; while in *Lampert v. LaCledé Gas Co.*, 7 Western Rep. 745, it appeared that the Gas Company had agreed with the City to keep the street lamps in repair, and it was held that a person injured by a broken lamp-post, left in a dangerous condition on a public highway, could not recover against the company. The situations presented in these cases were essentially different from that with which we are here confronted. They would be analogous to the case at bar if the water companies, in the cases first mentioned, instead of failing to furnish water, had forced it through defective pipes and had thereby caused it to escape to the injury of the plaintiffs; and if the Gas Company, in the case last cited, instead of merely omitting to remove a broken lamp-post from a highway which it was the duty of the municipality to keep safe, had allowed gas to escape through the post and had thus caused injury to the person suing.

In this case it was not the fractured pipe but the discharge of gas that injured the appellees, and their recovery cannot be denied upon the theory that the negligence imputed to the appellant did not amount to misfeasance.

In support of the contention that the only recourse of the appellees was against the City, it was pointed out that the City, by ordinance had undertaken to keep the street-lamps in repair, and certain of its enactments on the subject were offered in evidence. These commit to the Superintendent of Lamps and Lighting the duty of providing for the lighting, cleaning and repairing of the "City lamps," and for the "furnishing, construction, erection, repair or removal of all street lamps and lamp pillars." By their plain terms these provisions deal only with the *lamps* and *lamp-posts* furnished by the City, and they make no reference to the *service pipes*

Md.]

Opinion of the Court.

through which the lamps were to be supplied with gas. Under the authority of the ordinance quoted, the Superintendent, on behalf of the City, contracted with the American Lighting Company for the lighting, extinguishing and cleaning of the lamps, and the equipment, maintenance, painting and repair of all the "lamp-posts, lanterns, equipment and property of the City."

It, therefore, appears that the City neither assumed for itself nor undertook to delegate to the contractor, just mentioned, the duty of keeping in order the connecting pipes, but that duty was left, where it properly belonged, with the company that installed them for the transmission of the gas which it had contracted to deliver to the lamps. *Blondell v. Consol. Gas Co.*, 89 Md., 748.

The questions we have considered were raised upon exceptions to the granting of the plaintiffs' second prayer, and to the refusal of the prayer offered by the defendant for the withdrawal of the case from the jury. These latter prayers were predicated upon theories which we have discussed and disapproved. The second prayer of the plaintiff was objected to on the ground, in addition to the contentions we have reviewed, that it permitted the jury to render a verdict against the defendant if they should find that by reason of its failure to use due care the gas supplied by the defendant "leaked or escaped from its pipes, or from pipes which in the operation of its business it used and assumed the duty of repairing," to the injury of the plaintiff. It is urged that the alterative we have italicized in this instruction is not in accordance with the declarations, which charge that the Gas Company was negligent in failing to repair *its* pipes. We do not consider this objection tenable. The declarations are, in our opinion, sufficiently broad to cover both the theory of ownership of the pipes by the company, and the theory of its assumption of their control and repair, as the pipes which the company assumed the duty of repairing were part of its system for

distributing its product and were "its" pipes for all the intents and purposes of its liability in these suits.

The rulings of the Court below accord with the views we have expressed, and the judgments appealed from will be affirmed.

Judgments affirmed, with costs.

UNITED RAILWAYS AND ELECTRIC COMPANY
vs. REBECCA KOLKEN.

Accident at Street Railway Crossing—Contributory Negligence—Failure to Avoid Injury After Seeing Plaintiff's Peril—Sufficiency of Evidence—Instructions.

Even if a plaintiff was guilty of contributory negligence in attempting to cross a street in front of an approaching electric car, he is nevertheless entitled to recover damages for an injury caused by collision with it, if the motorman could, by the exercise of due care, have avoided the accident after he saw, or, by the exercise of proper care, might have seen, the plaintiff as he was about to cross the tracks.

In the application of this rule, it makes no difference whether the plaintiff's negligence consisted of venturing to cross the street without looking to see if a car was coming or in attempting to cross after seeing an approaching car.

In the running of electric cars on city streets, a motorman is required to anticipate the conduct of pedestrians crossing the streets to the extent of keeping a sharp lookout, giving proper warning and reducing the speed of the car so as to have it under control for the purpose of avoiding injury to those who may be on the crossing.

In an action to recover damages for an injury caused by plaintiff's being struck by defendant's street railway car at a street crossing, the plaintiff's evidence was to the effect

Md.]

Statement of the Case.

that as she was about to start across a street on which were defendant's tracks, at a corner crossing, she saw a car coming slowly, which was then about two hundred feet distant; that the view was unobstructed and she started across without looking again, and was struck when she reached the track, thrown on the fender and carried for some distance before being thrown off. Other witnesses testified that the speed of the car was increased as it approached the crossing, and when it reached there was going at full speed; that the motorman was looking at people on the sidewalk and did not ring the bell, or check the speed of the car until after the plaintiff was struck. The evidence on the part of the defendant was that the car was going slowly and the bell was rung. *Held* that prayers offered by the defendant were properly rejected which instructed the jury that there was no legally sufficient evidence of negligence on the part of the defendant, and that the plaintiff was guilty of such contributory negligence as to bar her recovery. These prayers ignore the plaintiff's evidence, that the motorman had a clear view of the crossing; that he was not looking ahead; that he did not ring his bell, and that the car was running at full speed when it reached the crossing and struck the plaintiff.

Decided November 16th, 1910.

Appeal from the Court of Common Pleas of Baltimore City (HEUISLER, J.), where there was a judgment on verdict for the plaintiff for \$3,500.

The prayers referred to in the opinion of the Court are as follows:

Plaintiff's 1st Prayer.—That if the jury believe from the evidence that the plaintiff received the injuries to her person as mentioned in the evidence, by being run into, struck and knocked down by a car of the defendant in charge of the motorman and conductor in the employ of the defendant, and that said running into, striking and knocking down was caused by the negligence of the defendant's motorman in the management of the car of which he was the motorman, and

that the plaintiff was, at the time of the accident walking across Charles street at the crossing thereon near Hill street, both being streets of Baltimore City, using due care in so doing, then the plaintiff is entitled to recover. (*Granted.*)

Plaintiff's 2nd Prayer.—Even if the jury find that there was want of ordinary care on the part of the plaintiff, yet she is entitled to recover, provided the motorman could have avoided the accident by the exercise of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was approaching near to the track and in danger of being struck by the car. (*Granted.*)

Plaintiff's 3rd Prayer.—In estimating damages the jury are to consider the health and condition of the plaintiff before the injuries complained of as compared with her present condition in consequence of such injuries, and whether the same are in their nature permanent, and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of such injuries, she would have been qualified; and also the physical and mental suffering to which she had been subjected by reason of said injuries, and the jury are to allow such damages as in their opinion will be a fair and just compensation for the injuries suffered. (*Granted.*)

Defendant's 1st Prayer.—The defendant prays the Court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. (*Refused.*)

Defendant's 2nd Prayer.—That from the uncontradicted evidence in this case the plaintiff was guilty of negligence directly contributing to the accident complained of and therefore their verdict must be for the defendant. (*Refused.*)

Defendant's 3rd Prayer.—That if the plaintiff was injured in consequence of the plaintiff's failure to act on the occasion of the accident as a person of ordinary care and prudence would have acted under the circumstances, and that such failure to use ordinary care and prudence directly contri-

Md.]

Statement of the Case.

buted to the accident, the verdict must be for the defendant. (*Granted.*)

Defendant's 4th Prayer.—If the jury shall find from the evidence in this case, that the plaintiff stepped in the way of the car of the defendant when it could not be arrested in its course and under circumstances where with ordinary care on the part of the motorman the car could not be brought to a pause early enough to save her from injury, the defendant is not liable. (*Granted.*)

Defendant's 5th Prayer.—If the jury find from the evidence that the plaintiff could, by the use of reasonable care and diligence, have seen the defendant's car approaching in time to avoid the alleged accident, then there can be no recovery in this case and the verdict must be for the defendant. (*Refused.*)

Defendant's 6th Prayer.—That, notwithstanding the jury may believe from the evidence that the defendant was guilty of negligence, yet if they shall further believe from the evidence that the plaintiff was also guilty of negligence, and that the injury was directly caused partly by the defendant's negligence and partly by the negligence of the plaintiff, then the verdict must be for the defendant without regard to whose negligence was the greater. (*Refused.*)

Defendant's 7th Prayer.—That if the jury find that on the occasion mentioned in the evidence the car of the defendant company was running south on Charles street, and that after leaving York street the speed of the car was increased to full speed, and that from that point to the place where the plaintiff was struck the car continued to run at full speed, and if the jury shall further find from the evidence that when the car left York street the motorman in charge thereof was not looking ahead, but was looking to the east at girls who were skylarking on the east side of Charles street, if the jury shall so find, and if the jury shall further find that at the time the car left York street, the plaintiff was standing on the pavement at the northwest corner of Charles and Hill

streets, and looked in the direction from which the car was coming, and saw or by the use of reasonable diligence could have seen the speed at which the car was running, and that the motorman was not looking ahead but was looking to the east, and if the jury shall find that the plaintiff then left the pavement and started across the street and across the tracks upon which the car was running, and was struck and injured in the manner mentioned in the evidence, then there can be no recovery in this case, and the verdict must be for the defendant. (*Refused.*)

Defendant's 8th Prayer.—That if the jury shall find from the evidence that at the time the car left York street, the plaintiff was standing on the pavement at the northwest corner of Charles and Hill streets, and that she looked in the direction in which the car was coming and saw, or by the use of ordinary care, could have seen the car and the speed at which it was coming, if the jury shall so find, and if the jury shall further find that she thereafter started to cross the street and did not look again for the approaching car before entering upon the track upon which it was approaching, and if the jury shall further find that if she had looked when near to the track and before entering upon the line thereof, the danger of being struck by the oncoming car would have been seen by her and that she could then have avoided the accident by the use of ordinary care by stopping in a place of safety, if the jury shall so find, then the verdict must be for the defendant. (*Refused.*)

Defendant's 9th Prayer.—That if the jury shall find from the evidence that the plaintiff saw, or by the use of ordinary care, could have seen a car approaching before she started to cross the street, and shall further find that she did not look again before attempting to cross the track to see how close the car was upon her, and if the jury shall further find that if she had so looked, while she was still in a position of safety, to the side of the track, and before entering upon the line of travel of the car, she would have seen that the car

Md.]

Opinion of the Court.

was close upon her and that if she entered upon the line of its progress an accident was inevitable, if the jury shall so find, then the verdict must be for the defendant. (*Refused.*)

Defendant's 10th Prayer.—That it was the duty of the plaintiff before crossing a car track on which she knew that the car was approaching, if the jury shall find that she did know that a car was approaching thereon, to look to see how close the car was upon her before getting in the way thereof, and if the jury shall find that the plaintiff failed to look before getting in the way of the car, and shall further find that if she had so looked that she could have avoided the accident by the use of ordinary care, then the verdict must be for the defendant. (*Refused.*)

Defendant's 11th Prayer.—That it is the duty of a pedestrian before crossing a street railway track to look to see if a car is approaching, and if the jury shall find from the evidence that the plaintiff failed to look before crossing the track, and shall further find that if she had looked she could by the use of ordinary and reasonable care have prevented the accident complained of, if the jury so find, then her negligence directly contributed to the accident and there can be no recovery in this case, and the verdict must be for the defendant. (*Refused.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Joseph C. France and *J. Pembroke Thom*, for the appellant.

Robert F. Leach, Jr. (with whom was *Walter L. Wells* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

This appeal is from a judgment recovered by the plaintiff in the Court below for injuries alleged to have been caused

by the negligence of the employees of the defendant, the United Railways and Electric Company of Baltimore, and the only exception in the record is to the ruling of that Court granting the plaintiff's prayers and rejecting the first, second, fifth, sixth, seventh, eighth, ninth, tenth and eleventh prayers of the defendant. The Reporter is requested to set out the prayers in his report of the case.

The accident which resulted in the injury complained of occurred between six and seven o'clock in the morning, on the 5th of March, 1909, at the crossing of Charles and Hill streets, in Baltimore City. There are two railway tracks on Charles street, which runs north and south, one called the west or southbound track, and the other the east or northbound. One square north of Hill street is Lee street, and between Hill and Lee streets there is a narrow street which ends at Charles street, called York street. The distance between the south side of Lee street and the north side of Hill street is three hundred and sixty-six feet, and it is about one hundred and fifty feet from the north side of York street to the crossing from the northwest corner to the northeast corner of Charles and Hill streets. At this crossing the west or southbound track is twelve feet from the curb.

The plaintiff, Rebecca Kolken, who lived on Hill street, east of Charles street, states that on the morning of the accident she left her home at No. 30 Hill street and went across Charles street to Berman's grocery store, on the northwest corner of Charles and Hill streets, to buy her breakfast; that as she was returning home, carrying a bottle of milk and a small dish of cream, just as she was about to setp from the pavement to the crossing she looked up Charles street and saw a car coming south; that the car was then between Lee and York streets, nearer to Lee street, and was "going slow;" that seeing that the car was a long distance away, and that the motorman had an unobstructed view of the crossing, she started across the street, and that as she was crossing the

Md.]

Opinion of the Court.

tracks the car struck her and threw her on the fender. She further testified that she did not hear a bell, and on cross-examination stated that after seeing the car, as she started across the street, she did not look again because when she saw it the car was a long distance away and the motorman could see her. A number of the plaintiff's witnesses who saw the accident testified that as the plaintiff started across the street they saw the car above or about York street; that there was nothing on the street to obstruct the motorman's view of the crossing; that the speed of the car was increased as it passed York street, and that it was going rapidly or at full speed when it reached the crossing; that as the car approached the crossing the motorman was looking to the east at some girls on the east side of Charles street, and that as he did not ring the bell or check the speed of the car until it reached the crossing and struck the plaintiff. Other evidence in the case shows that the motorman did not succeed in stopping the car until it had nearly reached the opposite side of Hill street; that the plaintiff was carried some distance on the fender and was finally thrown to the east side of the car, and that one of her arms was so badly crushed that it had to be amputated just below the shoulder.

The motorman in charge of the car at the time of the accident was not present at the trial in the Court below, but the conductor testified that "from the time it left Lee street" the car "was going between six and seven miles an hour;" that the motorman was ringing his bell as he approached the crossing, and that "as he drew up to the corner he reversed the car, putting down brakes." Other witnesses for the defendant also testified that the car was moving at moderate speed, and that they heard the bell before the car got to the crossing.

By its first and second prayers the defendant sought to have the case withdrawn from the jury: first, because there was no evidence legally sufficient to entitle the plaintiff to recover; and, second, because she was guilty of contributory

negligence, and by the other rejected prayers the Court was asked to instruct the jury that if they found that the plaintiff was guilty of contributory negligence she was not entitled to recover. All of these prayers, in effect, entirely ignore the evidence adduced by the plaintiff to show that the motorman had a clear view of the crossing; that he was not looking ahead; that he did not ring his bell, and that the car was running at full speed when it reached the crossing and struck the plaintiff. It is the duty of those in charge of a car to keep a sharp lookout as they approach a street crossing, and to slacken the speed of the car sufficiently to enable them to have it under control, so as to avoid injuring those who may be crossing the street, and the evidence adduced by the plaintiff tended to show not only that the defendant was negligent in the management of its car, but that the motorman saw, or by the exercise of proper care could have seen the plaintiff in time to have stopped the car before it struck her. Under such circumstances it would have been error to have taken the case from the jury upon either of the grounds stated in the first and second prayers, or to have instructed the jury that if they found that the plaintiff was negligent she was not entitled to recover, for even if the plaintiff was guilty of contributory negligence in attempting, under the circumstances, to cross the street in front of the approaching car, she was still entitled to recover if the motorman could, by the exercise of due care, have avoided the accident, after he saw, or by the exercise of proper care, might have seen the plaintiff as she was about to cross the tracks. This is the rule that has been repeatedly recognized by this Court as applicable to cases like the one at bar. *Lake Roland Co. v. McKewen*, 80 Md. 593; *Balto. Traction Co. v. Appel*, 80 Md. 603; *Consolidated Ry. Co. v. Rifcowitz*, 89 Md. 383; *United Railways Co. v. Ward*, 113 Md.

In *McKewen's case* the prayer which this Court said was "quite as favorable to the defendant as it had any right to expect," instructed the jury that the plaintiff was guilty of

Md.]

Opinion of the Court.

contributory negligence, and was not entitled to recover, “unless the jury believe from the evidence that the motorman of the car in question, after he saw, or by the exercise of due care might have seen that the plaintiff was approaching the track and was apparently about to cross in front of his car, and that the attempt to do so would be dangerous to the plaintiff, might still, by the exercise of reasonable care in the management of said car, have avoided the collision, but failed to exercise said care.” In the case of *Consolidated Ry. Co. v. Rifcowitz*, *supra*, the defendant offered a prayer instructing the jury that the plaintiff’s evidence was not satisfactory or legally sufficient to entitle her to recover, and the Court below granted it after having modified it by adding these words: “*unless the jury shall further find that after the motorman saw, or could reasonably have seen, the peril of the plaintiff, he failed to exercise ordinary care to avoid the accident.*” In reference to this prayer the Court said: “The modification which the learned Judge below made in the first prayer of the defendant before granting it was an entirely proper one, and was requisite to make it conform to the law governing the case.—Mere negligence or want of ordinary care will not disentitle a plaintiff to recover, if the defendant might by the exercise of care on his part have avoided the consequence of the neglect or carelessness of the plaintiff.—If the Court had not modified the prayer it would have taken from the jury the question of relative negligence of the parties.” In the later case of *Consolidated Ry. Co. v. Armstrong*, 92 Md. 554, counsel for the company insisted that the rule we have stated, or rather the modification of the doctrine of contributory negligence, should be limited to cases in which the defendant could have avoided the accident by the exercise of due care after he actually saw the plaintiff’s peril, but this Court refused to adopt that view, and said: “It cannot be seriously contended that when the defendant is in a position from which he ought to see, or by the exercise of reasonable care could see the plaintiff’s peril,

he may avert his face or close his eyes and not see it and then escape liability for an injury resulting from such conduct on his part.—The law will not permit the loss of life or limb or even property to be deliberately or carelessly inflicted, when it could by reasonable care and caution be averted, merely because the injured person was negligent.” And in *Ward’s case* we said: “but even if we assume that the appellee did not, before attempting to cross the tracks, look to see if a car was approaching, and that he was to that extent negligent, the Court below would not have been justified in directing a verdict for the defendant on the ground of contributory negligence, or because there was no evidence of negligence on the part of the defendant.—If the motorman in charge of the car in question saw the appellee, or by the exercise of due care could have seen him in the act of crossing the tracks in time to have prevented the accident, it was his duty to have stopped the car in time to avoid the collision; and if the accident occurred by reason of his failure to do so under such circumstances, his negligence, and not the negligence of the appellee, was the proximate cause of the injury.”

Learned counsel for the appellant, while recognizing the rule referred to, contend that it does not apply to the case at bar because here the plaintiff saw the car as she started across the street. But it can make no difference in the application of the principle whether the plaintiff’s negligence consisted in venturing across the street without looking to see if a car was coming or in attempting to cross after seeing the approaching car; the rule relates to the duty of the defendant after the motorman saw, or by the exercise of reasonable care could have seen her peril. Counsel for the appellant, relying upon cases like the case of *McNab v. United Railways Co.*, 94 Md. 728, further contend that even if the motorman saw the plaintiff crossing the street, he had a right to assume up to the very moment she stepped on the tracks

Md.]

Opinion of the Court.

that she would not venture to cross until after the car had passed, and that the last act of negligence was committed by her. In *McNab's case* the accident happened at a crossing in the open country where cars are permitted and known to run at much greater speed than is allowed on the streets of a city, and JUDGE MCSHERRY, quoting from *Neubeur's case*, 62 Md. 401, said: "it was not the duty of those in charge of the train to anticipate the conduct of the plaintiff, and because they saw him approach the crossing to conclude that he would attempt to cross in advance of the train." But, as was distinctly recognized in that case, a very different rule applies to the running of cars on the crowded thoroughfares of a city, where the motorman *is required to anticipate* the conduct of those crossing the streets to the extent of keeping a sharp lookout, giving proper warning and reducing the speed of his car so as to have it under control for the purpose of avoiding injury to those who may be on the crossing. In the case of *Heying v. United Railways Co.*, 100 Md. 281, citd by counsel for the appellant, JUDGE FOWLER said that there was no evidence "to show that after the motorman saw her in a place of danger, or could have so seen her by the exercise of any, even the greatest degree of care, could have stopped the car in time to have avoided the collision."

What we have said in regard to the rejected prayers of the defendant disposes of the exception to the granting of plaintiff's second prayer, and we do not understand the appellant as excepting to the plaintiff's first and third prayers, to which we see no objection, except upon the ground presented in the contention that the case should have been taken from the jury.

Finding no error in the ruling of the Court below the judgment will be affirmed.

Judgment affirmed, with costs.

COMMERCIAL REALTY AND CONSTRUCTION
COMPANY *vs.* WM. C. DORSEY.

*Prayer Not Referring to the Pleading—Implied Warranty of
Fitness in Sales—Contract Cancelled by Buyer After Part
Performance—Recoupment in Action to Recover
Price of Prior Deliveries.*

When a granted prayer does not refer to the pleadings, its correctness must be determined entirely by a consideration of the evidence.

When a buyer orders articles not manufactured by the seller, and he has an opportunity to inspect the same before using them, there is no implied warranty of their quality. And if he returns to the seller some of the articles delivered because of defects, he is not entitled, in an action against him, to recover the price of those not returned, to recoup any damages arising from the return of the defective articles.

A contract for the purchase of lumber of specified kinds at designated prices provided that in case the seller should fail to supply any of the material within three days after a request, thereupon the agreement should become void and the buyer liable only for the price of lumber delivered down to and including the day of the stoppage of deliveries. In an action to recover the price of lumber delivered to the defendant before his cancellation of the contract under this clause and also the price of certain lumber delivered to and accepted by the defendant thereafter, *held*, that the defendant is not entitled to recoup damages arising from delay in the delivery of lumber before cancellation of the contract.

Held, further, that a prayer offered by the defendant is erroneous which instructs the jury that, if they find the contract was cancelled, then the plaintiff is not entitled to recover for any lumber not delivered down to the date of the cancella-

Md.]

Opinion of the Court.

tion. This prayer submits to the jury to find whether the contract was duly cancelled, which is a question of law, and also it denies the right of the plaintiff to recover for the lumber supplied thereafter and accepted by the defendant.

Decided November 30th, 1910.

Appeal from the Superior Court of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Francis E. Pegram and *John L. Sanford*, for the appellant.

Charles Lee Merriken and *Wm. S. Bansemer* (with whom was *Geo. A. Solter* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appeal in this case was taken from a judgment of the Superior Court of Baltimore City against the appellant company in a suit on a contract for the supply of building materials.

The company, on the eve of the erection of a row of small buildings in Baltimore City, entered into a written contract with the appellee William C. Dorsey on December 9th, 1908, to supply it with the requisite quantity of certain kinds of lumber and mill work, at specified prices, for the buildings. The negotiations were made and the contract was signed on behalf of the company by Abel Rosenthal, its President, and its corporate seal was affixed thereto. It was also signed, but not sealed, by Dorsey.

The contract provides among other things that, upon a failure at any time of Dorsey to supply any of the materials

called for by it, within three days after a request therefor, the company shall have the right to stop any further deliveries and thereupon "this agreement and every clause herein shall be and become absolutely null and void, the said party of the second part (the company) being liable only for the payment to the said party of the first part for such amount of money as may be due him for all lumber and mill work delivered hereunder down to and including the day of the stoppage of said deliveries."

On January 27th, 1909, after certain deliveries of materials had been made, the company notified Dorsey that it annulled the contract in accordance with its own terms for his failure to comply with demands for the further delivery of materials.

On November 12th, 1909, Dorsey instituted the present suit in covenant on the contract against the company filing with the declaration a tabulated statement of his claim which, as amended, charged the defendant with deliveries of material, prior to the receipt of the notice terminating the contract, amounting, at the contract prices, to \$693.45, and also with materials thereafter furnished amounting to \$29.60, a total of \$723.05, and crediting it with cash and the value at contract prices of materials returned by the company aggregating \$318.56, thus leaving a balance due of \$404.49. To this declaration the defendant pleaded "*nil debet*" and "*non assumpsit*," and, after issue joined short, the case was tried before a jury and a verdict rendered for the plaintiff for \$433.47. From the judgment entered on that verdict the present appeal was taken.

The record contains but one bill of exceptions and that relates to the action of the Court below on the prayers.

As there was no demurrer to any of the pleadings nor any special reference to the pleadings in the prayers which form the basis of the bill of exceptions, the correctness of those prayers must, under the settled practice in this State, be determined entirely by a consideration of the evidence. *Poe's*

Md.]

Opinion of the Court.

Practice, sec. 302; *N. Y. P. & N. Ry. Co. v. Bates*, 68 Md. 192; *Balto. Bldg. Assn. v. Grant*, 41 Md. 569; *Leopard v. Canal Co.*, 1 Gill, 222; *Dorsey v. Dashiell*, 1 Md. 207.

The execution of the contract and the fact of the delivery of the goods charged for as having been delivered prior to January 27th, 1909, in the statement of claim filed with the *narr.* were conceded; as was also the fact that the prices charged therefor were in accord with those mentioned in the contract, but the liability of the company was denied on the grounds stated in the prayers hereinafter mentioned.

There is evidence in the record on behalf of the plaintiff tending to show that Rosenthal, when he looked at the lumber in Dorsey's yard, for the purpose of purchasing material to be used in the erection of the houses, informed Dorsey that the company wanted cheap lumber and that he was then shown by Dorsey the identical lumber which was afterwards delivered under the contract, and that he agreed to buy it and that the contract prices for it were made low because of its low quality. There was also evidence tending to show that the sash charged for in the statement as of March 13th, 1909, consisted of special sizes of sash which had been made in December, 1908, on Mr. Rosenthal's order for these buildings and which Dorsey had offered to deliver to him and he had refused to receive and that they were still held subject to the order of the company by the plaintiff. The plaintiff testified in his own behalf that he had been slow in making deliveries under the contract because the company was not making its payments according to the agreement.

The company introduced evidence tending to contradict the facts thus testified to for the plaintiff and to further prove that the joists supplied by the plaintiff were put in place by it on the buildings when received, but that many of them were subsequently condemned by the building inspector of Baltimore City and had to be removed and were returned to the plaintiff. It was conceded that the plaintiff had given credit for these returned joists in the statement of his claim

but the company offered evidence tending to show that it had been put to an expense of \$75 for labor in removing the joists from the buildings and substituting new ones in their place and had suffered further loss from delay caused thereby.

At the close of the evidence the plaintiff offered one prayer which was granted. The defendant offered three prayers of which the first was granted and the other two were rejected.

The plaintiff's prayer asked the Court to instruct the jury:

(1) That under the true construction of the contract in writing between the plaintiff and defendant of December 9th, 1908, offered in evidence, the defendant had the right to cancel the said contract at any time the plaintiff should fail to make deliveries within three days from the date of demand made by Israel Silberstein, superintendent.

(2) That the letter of January 27th, 1909, from the defendant to the plaintiff, offered in evidence (if the jury shall find that said letter was received by the plaintiff) constituted a cancellation of said contract by the defendant.

(3) That upon the cancellation of said contract, the defendant became liable to the plaintiff for the payment to him, the plaintiff, of such amount of money as the jury may find was due for all lumber and mill work delivered under said contract, down to and including the date of the stoppage of said deliveries.

(4) That the defendant is not entitled to recoup as against the claims of the plaintiff, the item of \$75.00 mentioned in evidence, nor any other items of offset mentioned by the witness, Rosenthal.

The defendant's rejected prayers were as follows:

(2) The defendant prays the Court to instruct the jury that if they shall find from the evidence, the plaintiff and defendant entered into a contract whereby the plaintiff agreed to deliver to the defendant certain mill work and certain specified kinds of lumber, and if the jury shall further find that the plaintiff failed to deliver to the defendant the lumber specified in said contract, and delivered lumber of a dif-

Md.]

Opinion of the Court.

ferent kind, if they shall so find, then the plaintiff is not entitled to recover, and the verdict must be for the defendant.

(3) The defendant prays the Court to instruct the jury that, if they shall find from the evidence, the plaintiff and defendant entered into a contract whereby the plaintiff was to deliver to the defendant certain specified kinds of mill work and lumber; and if they shall further find that said contract contained a clause whereby the defendant could cancel said contract, and said contract was duly cancelled, if they shall so find, then the plaintiff is not entitled to recover for any mill work or lumber not delivered to the defendant down to and including the date of the cancellation of said contract.

We find no error in the Court's rulings on these prayers. It is plain from what we have already said that there was evidence in the case adequate to support the three first paragraphs of the plaintiff's prayer.

The fourth paragraph denied the defendant's right to recoup either the item of \$75 of alleged loss from the defective quality of certain joists supplied by the plaintiff, or the alleged losses, testified to by the witness Rosenthal, resulting from the delay of the plaintiff in making deliveries of the material bought from him.

The right of a defendant to recoup losses suffered by him through the fault of the plaintiff in connection with the contract or transaction forming the subject matter of the suit has received full recognition at the hands of this Court in all cases to which it is properly applicable. It has been more frequently allowed in actions on contracts for work and labor but it has also been upheld in suits for goods sold and delivered especially where the damages sought to be recouped arose from a breach of warranty, express or implied. The law upon this subject received consideration by us in *Queen City Glass Co. v. Clay Pot Co.*, 97 Md. 429, where we, quoting with approval from the cases of *Jones v. Just*, L. R. 3 Q.

B. 197, and *Rice v. Forsyth*, 41 Md. 403, and relying upon other cases there cited said:

“Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty, that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own.”

We have held with equal clearness that where the seller is not the manufacturer of the article sold and the buyer has an opportunity of examining it there is no implied warranty, in the absence of fraud, that it shall be fit for the purpose for which it was bought. In such cases, if there be no express warranty, the doctrine of *caveat emptor* applies and the buyer, not having seen fit to exact a warranty, takes upon himself the risk as to quality. *Horner v. Parkhurst*, 71 Md. 116; *Farren v. Dameron*, 99 Md. 337; *Rice v. Forsyth*, 41 Md. 389; *Raisin v. Conley*, 58 Md. 65.

In the case now before us it is not contended that the contract sued on contained any express warranty, and, as the joists, alleged to have been defective, were merely commercial lumber and not goods manufactured by the seller, and the buyer had ample opportunity to inspect them after they were delivered before using them, there was no implied warranty but he must be regarded as having assumed the risk of their quality. Furthermore it is not denied that the buyer returned the defective joists to the seller and a deduction equal to their contract price was made from the amount with which it was charged and no attempt is now being made to recover the price of those joists. Under these circumstances it is manifest that the defendant was not entitled to recoup the item of \$75 referred to in the prayer.

No defects in the quality of the other items of the material delivered under the contract, were set up by the defendant.

Md.]

Opinion of the Court.

but the witness Rosenthal testified in very general terms that the completion of the buildings was delayed for he "guessed" about two months by the plaintiff's tardiness in making deliveries of materials under the contract, which delay "so far as he knew" cost the defendant \$160 extra mortgage interest and \$18 a week wages for two men who had to be kept in its employment during that time.

No express warranty appears in the contract as to promptness of delivery of the articles sold nor is there any provision as to the time of delivery other than that deliveries are to be made "at the time and in the quantities that the superintendent Israel Silberstein may direct." As a protection to the buyer against tardiness in deliveries the contract contains the provision, already referred to, authorizing the superintendent to rescind and destroy the entire contract at any time upon a failure of the seller to deliver, within three days after demand, any of the material called for by the contract.

We think the defendant was not entitled to recoup the damages claimed for tardy deliveries of material by the plaintiff because it had by the express terms of the contract the means of protecting itself, by rescinding it at any time, immediately upon a failure of the plaintiff to make any delivery within the three days allowed him for that purpose and it was not compelled to submit to any further delay. The alleged losses testified to, other than those from defects in the quality of joists already disposed of by us, were strictly such as arose from delay.

The defendant lost nothing in any event by the denial of its right of recoupment, in granting the plaintiff's first prayer, because the Court, in granting the defendant's first prayer, went to the length of instructing the jury that if they found the making of the contract sued on and further found that the plaintiff failed to perform it "agreeably to the terms thereof" he was not entitled to recover at all and "their verdict must be in favor of the defendant." The defendant, having elected to ask no instruction from the Court as to its

Opinion of the Court.

[114]

right to recoup but to ask the much broader instruction in its favor contained in its first prayer and having obtained that instruction, had the case sent to the jury upon terms of which it has no right to complain.

The defendant was not entitled to the instruction contained in its second prayer, which totally denied the plaintiff's right of recovery, because the uncontradicted evidence shows that it retained and used all of the lumber delivered to it by the plaintiff except the portion returned by it to the plaintiff for which portion it received due credit in the statement of the plaintiff's claim.

The defendant's third prayer was bad because it submitted to the jury the question whether the "contract was duly cancelled" which is an issue of law, and further because, in the absence of any reference to the pleadings in the prayer, the plaintiff's right to recover for the window sash charged for, which had not been delivered when the notice to stop deliveries under the contract was given by the defendant, must be determined solely from the evidence. There was evidence tending to show that those sash had been made in special sizes prior to that date upon the defendant's order and a delivery of them had been tendered to it.

For the reasons mentioned by us we will affirm the judgment appealed from.

Judgment affirmed, with costs.

Md.]

Syllabus

THE NATIONAL EXCHANGE BANK *vs.* GINN & CO.

Banks—Payment of Check in Ignorance of Insolvency of Drawer, Indebted to the Bank.

If a bank pays a check drawn on it by a depositor at a time when it has claims against him greater than his deposit and in ignorance of the fact that the depositor had then become insolvent and that receivers had been appointed for him, the bank is not entitled to recover the amount of the check from the payee on the ground that the payment was made by reason of a mistake of fact. As between the holder of the check and the bank, the transaction is closed when the payment is made.

Decided November 30th, 1910.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, PATTISON and URNER, J.J.

Charles G. Baldwin (with whom was *G. Ridgely Sappington* on the brief), for the appellant.

Edward Duffy, for the appellee.

URNER, J., delivered the opinion of the Court.

This is an action by a bank to recover money paid on the check of a depositor, and recovery is sought upon the ground that the payment was made under a mistake of fact.

It appears without contradiction from the record that on October 19, 1909, the William J. C. Dulany Company drew

its check on the National Exchange Bank of Baltimore, the appellant, payable to the order of Ginn and Company, the appellees, for the sum of five thousand dollars. The check was mailed to the appellees in New York and was by them deposited on October 20, 1909, in the National Park Bank of that city. On the same day it was forwarded by that bank to the Farmers and Merchants' National Bank of Baltimore for collection. It was received by the latter bank on the morning of October 21st, and about nine o'clock on that morning the check was passed through the Clearing House and was paid about eleven o'clock by the appellant in the regular course of its clearance settlements. At ten o'clock approximately on the same morning receivers were appointed for the Dulany Company upon a bill alleging, and its answer admitting, its insolvency. The company's deposits with the appellant just prior to the payment of the check in question amounted to \$9,019.18. It was indebted to the appellant in the aggregate sum of \$21,620.80, including \$5,000 upon a promissory note which matured that day and \$5,792.02 upon a demand note. The appellant might have set off the Dulany Company's indebtedness against its deposit credits, but supposing it to be solvent and in ignorance of the receivership, the bank honored the \$5,000 check when it was presented in due course for payment. About fifteen minutes before twelve o'clock, and within an hour after it paid the check, the appellant learned for the first time of the appointment of receivers for the Dulany Company and of its insolvency. One of the officers of the appellant thereupon immediately offered to return the check to the Farmers and Merchants' Bank and requested repayment. This was refused, and the appellant then proceeded against the appellees as non-resident debtors and attached in the hands of the Farmers and Merchants' Bank as garnishee the funds which had been paid on the check.

The suit againsts the appellees was tried upon issue joined on general issue pleas to the common counts in assumpsit,

Md.]

Opinion of the Court.

including a count for money had and received, and resulted in a verdict for the defendants under the direction of the Court. There is but one exception in the record, and that refers to the action of the trial Court in thus withdrawing the case from the jury.

Upon the undisputed facts we have stated the question to be determined is whether the appellant, because of its ignorance of the drawer's insolvency at the time of the payment of the check, is entitled to recover the amount paid to the holder in order that the bank's right of set-off against the drawer may be utilized.

It is to be observed that this very interesting and important question is not here complicated by any of the elements of deception or imposition which are sometimes found in cases of erroneous payments. The conduct of every party concerned was characterized by absolute good faith. When the check was given the drawer had ample funds in the bank on which it was drawn. It was issued in the usual course of business and was used in payment of a valid claim. It was honored solely in consequence of a mistake as to the existence of a condition which, if known, would have induced a contrary course of action.

It was correctly assumed in the argument that the receivership created for the Dulany Company could not, under the circumstances, be regarded as influencing the result of this suit, because not only was the payment of the check made without knowledge of that proceeding, but it is clear that the appellant has a right of set-off which would absorb the fund if recovered. *Colton v. Drivers' Building Asso.*, 90 Md. 94; *Dubreuil v. Gaither*, 98 Md. 544.

As the suit is directly against the payee of the check, the situation is not affected by the rules of the Clearing House, through which it was presented and collected. One of these rules provides "that errors in exchange and claims arising from the return of checks or other causes are to be adjusted by eleven o'clock A. M. directly between the banks which are

parties thereto, and not through the Clearing House," and that "upon request made before eleven o'clock A. M. every bank shall extend until twelve o'clock the time for returning to it checks 'not good'." When the offer was made at about quarter to twelve o'clock to return the check under consideration it was refused upon the ground that it was made after eleven o'clock and that there had been no request prior to that hour for an extension of time. It is well settled that such a regulation is binding only upon the members of the Clearing House Association. Its rules are designed exclusively for their convenience and protection as among themselves, and have no effect upon the rights or liabilities of other parties. 5 Cyc. 614; *Merchants' Nat. Bank v. Nat. Bank of Commonwealth*, 139 Mass. 518; *Overman v. Hoboken City Bank*, 30 N. J. Law, 61. The failure of the appellant to offer to return the check and to demand repayment within the time prescribed by the rules of the Clearing House would therefore not impair its claim against the payee for the restoration of the fund if its right of recovery should be found to be otherwise perfect. So far as the purposes of this case are concerned, the situation is precisely the same as if the appellees had in person presented the check to the appellant and had received the money over its counter. Whether they are liable to repay it under the circumstances of the case is the sole question to be considered.

The appellant's theory is that the insolvency of the Dulany Company matured its obligations to the bank; that the deposits of the company thereupon became applicable to its indebtedness, and that consequently there was no money really available for the payment of the check when it was presented. It is argued, therefore, that the check was paid as the result of a mistake as to the true condition of the drawer's account.

In the case of *Manufacturers' Bank v. Swift*, 70 Md. 515. a check was paid by the bank on which it was drawn although the drawer "had no funds in the bank at the time of payment properly applicable to this purpose." The check was

Md.]

Opinion of the Court.

originally drawn against an account opened by the drawer in his name as sole trustee by the endorsement and deposit in that form of a check payable to the order of himself and another as trustees jointly. The payment accomplished by the check given by the trustee had no relation to the trust estate to which the deposit really belonged, but the bank was misled into the contrary belief by an order of Court, which had been brought to its attention, permitting the trustee who made the deposit, on account of the absence of his co-trustee, "to act as fully, in all matters pertaining to said trust, as if both were present and acting." Under the misapprehension thus induced the acting fiduciary was allowed to add to the check given by him as sole trustee the name of his co-trustee as a drawer. The deposit account being also changed so as to stand in the name of the two trustees it was then charged with the check as corrected. The bank having been required to restore the funds thus misappropriated from the trust estate, on the ground of its actual though unintentional participation in the breach of trust (*Swift v. Williams*, 68 Md. 236), brought suit against the payee of the check; but recovery was denied by this Court because the bank had been neglectful of its means of knowledge and because: "It is the duty of a bank to know the state of its depositor's account and if it makes a mistake in this respect it must abide the consequences. The presentation of a check is a demand for payment; if it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles if when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality. And the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

One of the decisions cited in the *Swift Case* as an authority in support of the proposition we have quoted was that of *Oddie v. National City Bank*, 45 N. Y. 735. There the check was presented for deposit to the bank on which it was drawn and was credited to the payee's account. This was treated as equivalent to payment of the check by the bank, and it was held that "where a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally * * * but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine."

In a situation somewhat analogous to the present the Supreme Court of Michigan, speaking through JUDGE COOLEY, said: "This case is certainly novel and peculiar. The drawees seek to recover from the payee the amount of a bill which they have accepted and paid and the genuineness of which is not disputed. The ground upon which they plant their right of recovery is that they have paid under a mistake of fact. The mistake consisted in their security from the drawer of the bill being fictitious, when they supposed it to be genuine and reliable. Admitting this to be so, how does the fact concern the payees? Do they assume to guarantee the fairness of the dealings of the drawers with the drawees, or the adequacy of any security upon which the dealings are based? Not, certainly, in ordinary cases * * * What is peculiar in the present case is that the security which was sent forward with the bill proved to be fictitious. It is said that the drawees relied upon this security, and would not have paid the bill but for a belief that it was valid. It is in this that the mistake consisted on which they relied for a recovery. If a mistake regarding their security will authorize the drawees to recall the payment made to the payee, no reason is perceived why a mistake regarding the responsibil-

Md.]

Opinion of the Court.

ity of the drawer, or regarding his honesty and integrity, or anything else upon which they relied for protection in their dealings should not justify the like action. If they suppose the drawer to be responsible when he is not, is not this as genuine a mistake of fact on their part as if they supposed a security to be good where it is fictitious?" The learned judge then proceeded to declare that "it would be an exceedingly unsafe doctrine in commercial law that one who has discounted a bill in good faith and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterward hold the money subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make the payment. The beauty and value of the rules governing commercial paper consists in their perfect certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influence the latter to honor the paper." *First National Bank of Detroit v. Burkham*, 32 Mich. 328.

The New Jersey Court of Errors and Appeals, in *National Bank of New Jersey v. Berrall*, 70 N. J. Law, 757, had under consideration a case in which the bank inadvertently paid a check drawn upon it after payment had been countermanded by the drawer and it was held that "where a bank receives in the ordinary course of business a check drawn upon it and presented by a *bona fide* holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment."

The same rule was applied by the Virginia Supreme Court of Appeals to the payment of coupons by a bank on bonds of one of its depositors under the erroneous belief that there were funds on deposit available for that purpose. *Citizens' Bank v. Schwarzschild and Sulzberger*, 109 Va. 539.

In a note to the last mentioned case, as reported in 23 L. R. A. 1092 (N. S.), it is stated to be the "general rule that, in the absence of fraud, the payment of a check or note by a bank upon which it is drawn or at which it is payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay it, cannot be recovered by the bank;" and numerous authorities are collected in support of this proposition.

A similar principle has been recognized by this Court in cases where payments of forged checks have been made by banks upon the supposition that they were genuine. *Commercial and Farmers' National Bank v. First National Bank*, 30 Md. 11; *Hardy v. Chesapeake Bank*, 51 Md. 562.

If, therefore, in the present case the appellant had actually set off the Dulany Company's indebtedness against its deposits, thus producing an overpayment, and had then inadvertently paid the check in question, it would clearly, under the authorities cited, have no right of action against the appellees. This is not in reality the precise condition with which we are now dealing, but we see no reason for applying to the case at bar a different rule from that which governed the cases to which we have referred. The mistake of paying the check of a drawer who has no funds to meet it is just as much due to ignorance of the real facts as is the mistake of making such payment in consequence of the erroneous assumption of the drawer's solvency. In every such instance the error results from a misconception which may have been more or less readily avoidable according to the particular circumstances. In the case of a check drawn against an insufficient deposit the bank has immediately at hand the means of learning the true state of the account, while in a case like the present, where its action is influenced by consideration of the financial responsibility of a customer, the usual sources of information may not be equally convenient. But whether the mistake relates to the condition of a drawer's deposit, as in the *Swift Case*, or as to the value of a security, as in the

Md.]

Opinion of the Court.

Michigan decision from which we have quoted, or as to the credit of a borrower, as in the case before us, it is occasioned by misapprehension as to facts which might have been ascertained and with which a bank is presumed to have the ability to acquaint itself in the prosecution of its business. In the present instance it was not the appointment of receivers for the Dulany Company, but the insolvency which that proceeding demonstrated, that made it desirable for the appellant to apply the company's deposits to its notes instead of honoring its checks. Insolvency without a receivership would have produced the same situation. It does not appear from the record how long the company was in failing circumstances prior to the payment now sought to be revoked. But if mere ignorance of the insolvency could be held to be a sufficient ground of recovery, it would make no difference in principle for what period of time that condition had existed. If the rule contended for by the appellant were to prevail "no one," to use the language of this Court in the *Swift Case*, "could know when he could safely receive payment of a check".

There does not seem to us to be any sound or reasonable basis upon which to distinguish this case from those we have cited in the application of the rule they announce, and to require the payees of the check here involved, who were in a much less favorable position than the appellant for knowing the responsibility of the drawer, to restore the money they have received in satisfaction of a *bona fide* debt, in order that the appellant may be relieved of the necessity, to which they would then be subjected, of resorting to the insolvent estate of the debtor.

The appellant relied upon the general rule that money paid under a mistake of fact may be recovered. There are, of course, many cases in which recovery has been permitted on the ground of mistake, such as *George's Creek C. and I. Co. v. County Commissioners*, 59 Md. 255; *B. and S. Railroad Co. v. Faunce*, 6 Gill, 68; *Citizens' Bank v. Grafflin*, 31 Md. 507; *Buchanan v. Pue*, 6 Gill, 112; *Baltimore v. Lef-*

ferman, 4 Gill, 425; and other authorities cited by the appellant. In all of these the facts were quite different from those presented in cases like the one now before us, which involve exceptional considerations relating to the convenience and certainty of commercial transactions as dependent upon reliability and finality in the disposition of negotiable paper, and which accordingly constitute an exception to the general rule.

The case of *Second National Bank v. Western National Bank*, 51 Md. 138, was cited by the appellant as supporting its contention that such a mistake as the one here shown may be corrected. In that case the bank was permitted to cancel its certification of a note for payment where it had been so marked contrary to a written order of the maker which had been overlooked, and where no rights or liabilities had been incurred or losses sustained in consequence of the error. We do not find this case at all inconsistent with that of *Manufacturers' National Bank v. Swift*, *supra*, establishing the doctrine which must control our present decision. The cases from other jurisdictions cited by the appellant were mainly suits between members of Clearing House Associations and were largely concerned with their regulations.

The Court below, in our opinion, committed no error in directing a verdict for the defendants in accordance with their prayer, and its judgment will be affirmed.

Judgment affirmed with costs.

Md.]

Syllabus.

JOSEPH BERMAN vs. ELM LOAN AND SAVINGS
ASSOCIATION.*Principal and Surety—Delay in Enforcing Liability of Principal Debtor—Extending Time of Payment—Pleas.*

A creditor may voluntarily forbear the prompt enforcement of his claim against the principal debtor without losing his right to resort to the surety.

In order to discharge a surety, it must be shown that the indulgence given by the creditor to the principal debtor was in pursuance of a definite agreement between them made upon a consideration, and such as would prevent the creditor from enforcing payment of the debt before the expiration of the extended time.

A surety may, as a condition of becoming such, stipulate with the creditor for diligence in enforcing payment of the debt by the principal debtor, and if, after such stipulation, the creditor fails to exercise diligence, the surety will be discharged.

Defendant was surety on a bond conditioned for the payment of a mortgage debt by a third party to the plaintiff. In an action on the bond, alleging non-payment of the mortgage, a plea is good on demurrer which alleges an agreement by the plaintiff with the defendant as a condition of his signing the bond sued on, that the plaintiff would diligently enforce payment and performance of the covenants of the mortgage, and alleging that the plaintiff had neglected to enforce such payment for about fifty weeks, whereby the mortgagor did not pay in full.

Another plea in said action alleging that the plaintiff for a moneyed consideration agreed with the debtor to extend the time of payment, sets up a good defence.

Decided December 2nd. 1910.

Appeal from the Baltimore City Court (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and UERNER, JJ.

Charles F. Stein (with whom was *M. R. Walter* on the brief), for the appellant.

Thomas C. Weeks, for the appellee, submitted the cause on his brief.

SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from a judgment of the Baltimore City Court, in an action of debt on a bond, against the appellant as defendant below.

It appears from the record that on August 17th, 1907, the appellee corporation, which is a Loan and Savings Association, took a mortgage from Benjamin Bisko and Jacob L. Zeiter on certain leaseholds in Baltimore City to secure the repayment of the sum of \$6,175 which it had loaned or advanced to them on sixty-two shares of its capital stock. By the terms of the mortgage the money advanced was to be repaid in specified weekly instalments of dues and interest to be regularly paid until each share of stock of the appellee should reach the par value of \$125. The mortgage contains a covenant by the mortgagors to pay the instalments of dues and interest as they matured as well as the ground rent and taxes on the mortgaged property, and also a consent to a decree for a sale of the property after a default in any of the conditions of the mortgage had continued for eight weeks.

As additional security for the repayment, to the extent of \$2,000, of the money thus advanced to the mortgagors the appellee took from the appellant Berman, his bond to it under seal for \$2,000 conditioned upon the repayment of that amount of the mortgage debt.

Md.]

Opinion of the Court.

On October 25th, 1909, the appellee instituted the present action, of debt on the bond, against Berman alleging that, although more than two thousand dollars of the mortgage debt was due, the mortgagors had paid but eight hundred and twenty-three dollars and forty-three cents, on account thereof, and claiming the balance of the \$2,000 from him.

Berman as defendant pleaded payment and four special pleas. The plaintiff joined issue on the plea of payment and demurred to the other pleas.

The special pleas all rely for a defense to the action on the alleged forbearance or neglect of the mortgagee to insist upon the payment of the instalments of the mortgage debt when they fell due, averring that the dues and expenses which the mortgagors covenanted to pay had been allowed to accumulate without payment for about fifty weeks, to the amount of about \$2,000 which but for such conduct on the part of the appellant would have been paid.

The second plea, which is the first of the special ones, sets up and relies upon an agreement by the plaintiff with the defendant, as a condition for his signing the bond sued on, "that it would diligently enforce payment and performance" of each of the covenants of the mortgage and avers that it had neglected to enforce such payment and performance for about fifty weeks whereby the mortgagors were excused from paying and did not pay more than two thousand dollars.

The third plea avers that the plaintiff without the knowledge or consent of the defendant materially altered the terms and conditions of the mortgage in that it from time to time extended the time for payment and performance of the covenants and conditions thereof during which time, save for such alteration, the mortgagors would have paid two thousand dollars on account of the mortgage.

The fourth plea simply sets up a failure on the part of the plaintiff to diligently enforce the payment and performance of the covenants and conditions of the mortgage with a resultant loss of its mortgage security to the extent of more than \$2,000.

The fifth plea alleges a material alteration by the plaintiff, without the knowledge or consent of the defendant, of the terms and conditions of the mortgage in that it, for a good and valuable consideration in money to it from the mortgagors, from time to time extended the time for the payment and performance of the covenants and conditions of the mortgage whereby the mortgagors did not pay to the plaintiff the sum of about two thousand dollars which, but for the said alteration, they would have paid.

The Court below sustained the demurrer to all four of the special pleas, whereupon the defendant with leave of the Court filed two additional pleas, designated the sixth and seventh.

The sixth plea averred, in greater detail than had been done in the previous ones, that the alteration of the terms and conditions of the mortgage had been accomplished through the making of an agreement by the plaintiff, without the defendant's knowledge or consent, extending the time of payment of the mortgage debt. The seventh plea set up the defense of *ultra vires*, insisting that the bond was void because the plaintiff, having been incorporated as a Homestead or Building Association under Article 23 of the Code, possessed authority to lend or advance money to its stockholders only upon the security of mortgages on real or leasehold property or pledges of its stock and not upon the bonds of individuals.

The plaintiff demurred to the sixth and seventh pleas and the Court sustained the demurrer whereupon the case was tried before the Court without a jury. The trial resulted in a verdict and judgment for the plaintiff and the defendant took the present appeal.

Md.]

Opinion of the Court.

There is no doubt that the law permits a creditor to voluntarily forbear the prompt and vigorous enforcement of his demands against a principal debtor without losing his right to resort to the surety. *Sascer v. Young*, 6 G. & J. 248; *Freaner v. Yingling*, 37 Md. 491; *Taylor v. State*, 73 Md. 217; *Gray v. Farmers Natl. Bank*, 81 Md. 631; *McShane v. Howard Bank*, 73 Md. 155; *Lake v. Thomas*, 84 Md. 623. In order to exonerate a surety from his liability it must be shown that the indulgence given by the creditor to the principal debtor was in pursuance of a definite agreement between them, resting upon a valid consideration, and of such a character that it would estop the creditor from enforcing the payment of the debt before the expiration of the extended time. *Obendorff v. Union Bank*, 31 Md. 131; *Hayes v. Wells*, 34 Md. 515; *Warner v. Williams*, 93 Md. 521; *American Iron Co. v. Beall*, 101 Md. 425.

In *Dixon v. Spencer*, 59 Md. 249, the law upon this subject as applicable to the facts of that case was recognized and thus stated: "The surety by his contract merely guarantees the payment by his principal of a certain sum of money at a stipulated time. This he engages to do and no more. Upon the default of the principal he has the right to pay the money, and to proceed at once against him for indemnity. If the creditor, however, makes a new contract with the principal, takes his promissory note, payable at another and further time, he is thereby precluded from suing on the original contract until the maturity of the note, and the surety is also deprived of the right to pay the money due on his contract, the payment of which is necessary to enable him to proceed against the principal. By his own act, the creditor has entered into a new contract with the principal, and for the time being has tied his own hands, and the hands of the surety so far as regards the original contract. In so doing without the consent of the surety the law says the latter shall be discharged."

It is also well settled that the surety may, as a condition of becoming such, stipulate with the creditor for diligence and activity on the part of the latter in enforcing payment of the debt by the principal debtor and if, in the face of such a stipulation, the creditor fail to exercise diligence and activity the surety will be discharged. *Freaner v. Yingling, supra*. Such a stipulation might with propriety be inserted in the bond as a condition of the surety's obligation or, if the bond be silent upon the subject, the stipulation might be made by an independent and collateral agreement contemporaneously with or as preliminary to the bond, provided it did not conflict or interfere with the terms thereof. *McCreary v. McCreary*, 5 G. & J. 157-8; *Creamer v. Stephenson*, 15 Md. 211; *Bashor v. Forbes*, 36 Md. 166; *Stallings v. Gottschalk*, 77 Md. 433.

Considered in the light of the familiar legal principles to which we have adverted, some of the special pleas before us will be found to be good while others must be regarded as defective.

The alleged facts, set up in the second plea, of a stipulation by the plaintiff, as a condition of the defendant's signing the bond, that it would diligently enforce the payment of the mortgage debt, and its failure to perform that stipulation would under the cases cited by us constitute a good defense to the action if they were proven to the satisfaction of the jury. That plea was therefore a good one.

The third and fourth pleas, which in effect relied merely upon the failure of the plaintiff to diligently enforce the performance of the covenants and conditions of the mortgage, were bad because mere inactivity or delay on its part in that respect would not discharge the defendant as surety on the bond. The third plea at first sight seems to rely on an alleged alteration by the plaintiff of the terms of the mortgage but upon closer inspection it appears that the alteration is alleged to have consisted of a voluntary abstention by the

Md.]

Opinion of the Court.

plaintiff from enforcing the payment of sundry instalments of the mortgage debt as they from time to time matured.

The fifth and sixth pleas set up an alleged alteration for a valuable consideration by the plaintiff of the terms of the mortgage, by means, as alleged in the fifth plea, of a consummated extension for a monied consideration of the time of payment of the mortgage debt and, as alleged in the sixth plea, of an executed agreement made for a valuable consideration for such an extension. Whatever might have been the effect of an attempt to modify the terms of the mortgage, which is required by law to be a written instrument under seal, by an executory parol contract, an executed agreement of that character such as is set up in the pleas under consideration was available to the surety as a defense to the present suit. *George v. Andrews*, 60 Md. 26; *Chilton v. Brooks*, 72 Md. 554; *Lake v. Thomas*, *supra*; *Nicholson v. Schmucker*, 81 Md. 465; 20 Cyc. 302.

As the appellant has not insisted upon or even mentioned his seventh plea in his brief we deem it sufficient to say that we find no error in sustaining the demurrer as to that plea.

For the error of the learned Court below in sustaining the demurrers to the second, fifth and sixth pleas the judgment appealed from must be reversed and a new trial awarded.

Judgment reversed with costs and new trial awarded.

J. SHORB NEALE vs. GEORGE V. PEVERLEY ET AL.

Trustees' Sale Vacated—Lower Bid Accepted After Offer of Higher Price.

A decree of a Court of Equity authorized trustees to sell certain real estate at either public or private sale. The property was first offered at auction, and was withdrawn when the highest bid was \$1,700. Afterwards negotiations for a purchase were begun by the appellee, who offered \$1,500. The trustees wrote that they would accept that offer upon the receipt of a certain deposit. Before a deposit was made and before a definite agreement to sell to the appellee, the trustees received the offer of a higher price for the land from a responsible bidder. Afterwards the appellee paid the deposit and the trustees reported a sale to him for ratification. Upon exceptions thereto by a person interested in the proceeds, *held*, that since the sale reported was made by the acceptance of a lower bid in preference to a higher offered prior thereto, the sale should be vacated.

Decided December 2nd, 1910.

Appeal from the Circuit Court for St. Mary's County (CAMALIER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Charles S. Hayden (with whom were *Lemmon & Clotworthy* on the brief), for the appellant.

Combs & Loker, for the appellee, submitted the cause on their brief.

Md.]

Opinion of the Court.

URNER, J., delivered the opinion of the Court.

This appeal is from an order of the Circuit Court for St. Mary's County overruling exceptions to a sale of real estate made by trustees under a decree of that Court and finally ratifying the sale as reported. The decree authorized the property to be disposed of at either public or private sale, and it was sold according to the latter method after two efforts to sell at public auction. As originally passed the decree appointed John F. Harris as sole trustee to make the sale, but upon his petition, stating his need of assistance because of ill-health, a supplemental decree was signed associating with him David S. Briscoe as co-trustee. It appears from the record that Mr. Briscoe conducted the negotiations which resulted in the sale eventually reported to the Court. The exceptions were filed by the appellant, J. Shorb Neale, a party interested in the cause and the proceeds of sale, and by William Riggs MacGill, who had made an offer to purchase which was declined. Mr. Neale's objections were based upon the ground that the property had been sold for an inadequate price and for less than could be obtained, and Mr. MacGill excepted because, as he alleged in a detailed narrative of his negotiations, he had, prior to the sale to the reported purchaser, George V. Peverley, made offers to the acting trustee to buy the property at a higher price. The latter exceptions were overruled by the Court below upon the theory that an unsuccessful bidder has no standing to question a sale of this character, while the former were held to be untenable because the conclusion was reached that the sale reported was properly consummated by the trustee and that there were no circumstances justifying its rejection.

The real estate in question, consisting of a farm of about three hundred acres, known as "Keech's Rest," when first offered at public sale under the decree was withdrawn at a bid of seventeen hundred dollars. When the second attempt was made to sell it in this way there were no bids re-

ceived. Subsequently, about the last of November, 1908, both Mr. MacGill and Mr. Peverley opened communications with Mr. Briscoe in reference to the purchase of the property. On December 17th, the trustee wrote Mr. Peverley that, in pursuance of their oral agreement that he wait ten days or two weeks for an offer on the farm, he had delayed answering another party who had inquired as to the price, and that he would be glad to have a proposition at once if there was to be one submitted. Two days later he wrote Mr. MacGill acknowledging his inquiry of November 28th and stating: "This property is in my hands as trustee and the price is to be determined by the Circuit Court for St. Mary's County; whatever price I might name, therefore, would not be conclusive; but any price offered, worthy of consideration, will be reported for approval or rejection. At a public offer of the property by a former trustee \$1,700 was refused. If you want the property, it is for sale, and if you will make an offer for it within reasonable figures, action in the matter will not be delayed, and you will be answered promptly." On December 18th Mr. Peverley wrote the trustee: "I can offer you \$1,500 for 'Keech's Rest.' If my price is acceptable, please advise in the near future." To this a reply was sent by Mr. Briscoe under date of January 4th stating that he had conferred with his co-trustee and their conclusion was to accept the offer subject to the approval of the Court, and adding "Acceptance means a deposit of \$200 and report of the offer and of the deposit and petition for ratification of sale." Without performing the condition as to the deposit Mr. Peverley wrote Mr. Briscoe on January 6th as follows: "I am in receipt of your favor of the 4th inst. with reference to my offer of the 18th ult. for Keech's Rest; I had almost given the matter up, but will go into the details; you will hear from me within a few days; will you kindly in the meantime send me the details in regard to boundaries, etc." With this request Mr. Briscoe

Md.]

Opinion of the Court.

immediately complied by sending on memoranda of the deeds from which the necessary data could be obtained. On January 20th John W. Brown, acting for Mr. MacGill, but not then disclosing his principal, offered the trustee \$1,600 for the property, and on the following day the latter wrote Mr. Peverley: "Your letter of the 6th inst., *in re* Keech's Rest, advised I would hear from you within a few days. Yesterday I received another and a better offer for this property, which remains unanswered because of the proposition of sale and purchase pending between us. I am writing, therefore, to inquire your conclusion in the matter." This letter was answered the same day by Mr. Peverley who stated that he was "hunting up title, lines, etc., of Keech's Rest;" that he had been unable to go down to the property, but expected to do so the following week; and that "of course if everything is straight, I must perform my part of the bargain." This did not prove to be satisfactory to the trustee, for he replied on January 25th as follows: "Your letter of the 22nd inst. duly received. I understand from this letter and the preceding letters that your offer for 'Keech's Rest' is in good faith and your intention is to buy the land. As the matter stands, however, there is no definite contract to buy. My letter to you of the 4th of January, inst., expressed the terms of sale, sufficiently, if agreed to, to secure the sale of the property to you, viz., 'a deposit of \$200.' My letter of the 21st inst. stated its object, and the reason for it. Nevertheless your letter of the 21st inst. ignores a contract, leaving the matter undertermined." The writer then proceeded to state that in the meantime another party was offering more for the land and urging acceptance by tendering a deposit; that his action was subject to criticism in refusing to accept a larger offer; but that he was willing to suffer this because of his disposition to deal fairly with Mr. Peverley, provided the latter's offer were made a complete contract by the deposit of \$200 in compliance with

the prescribed condition. On the succeeding day the offer of \$1,600 was renewed by Mr. Brown and Mr. W. E. Sherwood, with the explanation that it was made on behalf of Mr. MacGill; and on the same day a deposit of \$200 was received and accepted from Mr. Peverley. While the trustee was preparing the report of sale on January 27th, Messrs. Brown and Sherwood returned and offered \$1,750 as Mr. MacGill's representatives. This offer was declined, and the sale was reported to the Court as having been made to Mr. Peverley for \$1,500. Mr. MacGill's offer was later increased to \$2,000, and in his testimony he expressed his willingness to give \$2,200 for the property if anyone else should bid \$2,100.

The correspondence and evidence in the record establish the fact that the trustee was offered \$1,600 for the farm before he consummated the contract for its sale at \$1,500. While he may not have previously known that the larger amount was proposed on behalf of Mr. MacGill, it was nevertheless offered by one whose responsibility was not questioned and at a time when the trustee understood that he had entered into "no definite contract" to sell the land to Mr. Peverley. This understanding, we think, was entirely correct under the circumstances. Not only had Mr. Peverley's letter of January 4th, stating that the trustee would hear from him within a few days, left the matter so "undetermined" as to induce further inquiry as to his conclusion after the larger bid had been received, but the deposit stipulated as a pre-requisite to the purchase had not been made although more than two weeks had elapsed since this had been prescribed as a condition of the acceptance of the offer. It could not have been supposed that the deposit might be indefinitely delayed and the purchase yet be effective. Even if the trustee had so intended, he could not have allowed the prospective purchaser to consult his own convenience as to the time for making the deposit without disregarding the

Md.]

Opinion of the Court.

terms of the decree which provide, in the case of either public or private sale of the property, for the payment of "one-third of the purchase money in cash on the day of sale." There is no question as to the good faith of the trustee in the negotiations and as to the sincerity of his belief that he ought to permit Mr. Peverley to complete the purchase notwithstanding the pendency of "another and a better offer." The inquiry, however, to be dealt with by the Court is not whether the motives of the trustee were proper, or whether the sale was made for such a grossly inadequate price as to justify its rescission, but whether, against the objections of a party interested in the proceeds, the acceptance of the lower in preference to the higher responsible bid should be approved. The simple question is whether the Court, having due regard to the interests of the parties, should ratify a sale made in disregard of a more advantageous offer than the one reported. This question can be answered only in the negative.

It is a familiar principle that the Court is the vendor and the trustee is merely its agent. Until the sale has been ratified a transaction of this nature amounts only to an offer to purchase. It is the primary concern of the Court to dispose of the property under its control for the best price reasonably available. *Schindel v. Keedy*, 43 Md. 413; *Warfield v. Dorsey*, 39 Md. 299; *South Balto. Co. v. Kirby*, 89 Md. 64; *Lurman v. Hubner*, 75 Md. 273; *Callaway v. Hubner*, 99 Md. 534; *Horsey v. Hough*, 38 Md. 139; *Miller's Equity Procedure*, 566. It is far better, as this Court has said, that the purchaser should lose the benefits of a good bargain than that the parties in interest should suffer loss by the improvident terms on which the property may have been sold. *DeFord v. McWatty*, 82 Md. 178. The Court should not ratify a sale made by the trustee in misapprehension of his duty where loss results to those entitled to the proceeds. *Horsey v. Hough*, *supra*.

Here a property for which \$1,700 had been refused at public sale was sold at private sale for \$1,500 in the face of a pending responsible bid of \$1,600. If this sale had been made at public auction it would not be suggested that an acceptance of the lower offer should be ratified by the Court. There is no reason why a private sale should not also be accorded the advantages of legitimate and seasonable competition.

The Court below was of the opinion that a complete and valid contract had been entered into between the trustee and Mr. Peverley before the higher price was offered; but in this view we are unable to concur.

As the controlling question in the case is presented by the exceptions of Mr. Neale, who is conceded to be a party in interest, and as he is the only appellant, it will not be necessary for us to consider the point as to Mr. MacGill's right, as a bidder whose offer was declined, to file exceptions to the sale.

The order of ratification will be reversed and the cause remanded to the end that the property may be again offered for sale by the trustee; but in view of the good faith of all parties concerned the costs will be directed to be paid out of the proceeds of sale.

Order reversed and cause remanded, the costs above and below to be paid out of the proceeds of the real estate decreed to be sold.

Md.]

Syllabus.

DAVID W. JONES vs. WILLIAM ORTEL.

Newspaper Report of Market Prices—Trove for Conversion of Shares of Stock—Instructions—Harmless Error.

The newspaper report of the market prices of goods and stocks is admissible in evidence to show such prices when it is proved that the newspaper is accepted by the persons dealing in those things as trustworthy in stating the market prices. In such case, it is not necessary to show how the newspaper obtained the information so published. But if a newspaper is not recognized by the trade as furnishing reliable statements concerning the market prices, there must be evidence to show how its published information as to the particular market price was obtained, before it can be admitted in evidence.

When the evidence in the case is sufficient to show that at the time the plaintiff demanded from the defendant the return of his property, the latter had it within his power to return the same, then the refusal to do so is evidence of a conversion of the property by the defendant sufficient to support an action of trover.

Trover lies to recover damages for the conversion of shares of stock.

Plaintiff gave to defendant a certificate for forty shares of stock in a mining company, endorsed in blank, with directions to have it sold for not less than \$13.50 per share. Subsequently the plaintiff demanded the return of the stock, without getting it. More than a year afterwards, the defendant offered to the plaintiff a certificate for forty shares of stock which had been issued in the defendant's name. Plaintiff refused to accept this. In an action of trover, alleging a conversion of the shares so delivered to the defendant, there was evidence tending to show that the defendant had sent the stock to a broker in New York, by whom it was sold after

plaintiff had demanded its return, and that the defendant had received the benefit of the broker's act. The trial Court instructed the jury that if they found that the plaintiff delivered the shares of stock to the defendant to be sold by him for the plaintiff at not less than \$13.50 per share in cash, and that thereafter the plaintiff demanded the return of said stock or the said price thereof, and that the defendant refused to return the stock, then the plaintiff is entitled to recover such sum as the jury may find to be the value of the stock at the time of demand and refusal. *Held*, that the defendant is not entitled to except to this prayer on the ground that there was no evidence that he was directed to sell for cash, since a sale is presumed to be for cash unless otherwise provided.

Held, further, that although according to the evidence, the plaintiff demanded the return of the stock, and not the sum of \$13.50 per share, the defendant was not injured by the assumption in the prayer that the plaintiff demanded either the stock or its said value.

Decided November 30th, 1910.

Appeal from the Baltimore City Court (ELLIOTT. J.).

The case was argued before BOYD, C. J., BRISCOE. PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

Horton S. Smith, for the appellant.

William Colton, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellee on this record recovered a judgment against the appellant in the Baltimore City Court, and this appeal, which is prosecuted by the defendant in that suit, brings up for review three exceptions reserved by the defendant during the progress of the trial. The suit is one in trover to recover damages for the conversion by the defendant "of

Md.]

Opinion of the Court.

forty shares of the capital stock of the Mitchell Mining Company, a corporation" the property of the plaintiff, and of the value of thirteen dollars and fifty cents per share. The defendant pleaded *non cul* and *non detinet*. Issue was joined by the plaintiff upon the first plea, and by the defendant to the plaintiff's traverse of the second plea.

The plaintiff, William Ortel, on examination in chief testified that he was engaged in the grocery and provision business, and that the defendant, Dr. David W. Jones, had been for many years his family physician, and that he had bought through the defendant forty shares of stock of the Mitchell Mining Company at ten dollars per share. That he had received one certificate for these forty shares issued in his name. He further testified that in response to a message he called to see the defendant on March 1st, 1906, and that Dr. Jones then said to him, "now is the time for you to sell your stock," and that he replied, "if you think so all right;" that the Doctor said he had sold out that day, and thought best for me "to sell mine;" that he delivered his certificate to the defendant the next morning, and at the suggestion of Dr. Jones he endorsed the certificate "in order that it would not delay things in case they would be sold, they would not have to be returned from New York again;" that at the time he delivered the certificate he told the defendant that unless he got thirteen dollars and fifty cents per share not to sell; that in a few days after the delivery of the certificate, he met the defendant on the street and said to him "Doctor, I would like to have my stock. He said all right I will send for them. That was a few days after but I could not say what day, but I instructed him that I wanted my stock." He further said that later in the month of March he again asked the defendant about the stock, and was told by him that it was all right, and was well locked up, and that was all the satisfaction he could get; that he asked him for the stock at that time, but has never received

it; that in 1907 the defendant sent for him and he went to his home and the defendant said, "I do not understand it, Will, here is what they sent me," and showed a certificate for forty shares of stock of the Mitchell Mining Company issued in the name of the defendant. The plaintiff refused to accept the certificate. On cross-examination the plaintiff said he gave the stock to the defendant to sell, and that he supposed he would send it to New York to be sold, but instructed him not to sell unless he got thirteen and a half dollars per share; that he "got him to make a statement that he should go to work and get thirteen dollars and fifty cents to whoever it might concern." On the day that the stock was delivered the defendant, in the presence of the plaintiff, wrote the following letter to William G. Gallagher, a stock broker, in New York:

- "BALTIMORE, MD., March 2nd, 1906.

Dear Billy:—

I enclose certificate No. 1146 Mitchell Mining Company in the name of William Ortel. Please sell the same at $13\frac{1}{2}$ to 14, not less than $13\frac{1}{2}$. Please send receipt for same and oblige."

This is what the plaintiff referred to as the statement made by the defendant at the time the stock was delivered. The plaintiff said that he did not know at the time to whom the stock was sent, nor did he know as a fact that it was sent; that in 1907 after Doctor Jones had offered to give him the certificate referred to above, he ascertained the address of William G. Gallagher, and on October 23rd, 1907, wrote to him as follows: "Please send by mail William Ortel's old certificate of the Mitchell Mining Company, the old original certificate and no other." On November the 14th, 1907, he again wrote to Gallagher saying that he understood that his stock had been transferred on March 12th, 1906, and demanding the "certificate, or the amount with interest up to date." In explanation of these letters the plaintiff said his

Md.]

Opinion of the Court.

object in writing them was to find out who really had the stock; that he wanted to avoid litigation and thought Doctor Jones should settle with him. He said he gave the stock to Doctor Jones to sell, but did not know whether it had been sold or not. He further testified that the defendant told him in October, 1907, when he showed him the certificate, that he had no stock of the Mitchell Mining Company.

The plaintiff then offered in evidence the files of the Baltimore News for the month of March, 1906, showing the quotations of prices of the stock of the Mitchell Mining Company from March 1st to March 15th. The defendant objected to the introduction of these files in evidence, and made a motion to strike out the newspaper quotations, but the Court overruled the motion. This constitutes the first exception. The testimony of Doctor Jones, the defendant, tended to show that he sent the certificate to Gallagher at the request of the plaintiff; that Gallagher had been doing a brokerage business in New York for him in connection with the Mitchell Mining Stock, and that the plaintiff told him to send the stock to Gallagher to sell; but that he wanted not less than thirteen and a half or fourteen dollars a share for it. He testified that it was possibly two months after the stock had been sent to Gallagher that he had his first conversation with the plaintiff, and that after that time he had several talks with him, and asked what he intended to do with his stock; and that the defendant "said he was not in the hurry to sell it as long as it did not bring what he thought he ought to get for it. He thought it would turn out all right in time. So the matter ran along then, for I expect a year or better, and the stock began to dwindle down all the time and I would often meet him. I had been attending to his family for a number of years and I would speak to him about it, and spoke to him several times on the street in reference to the matter, and he said he was perfectly satisfied, he wanted to know if I thought it was safe with Mr. Galla-

gher, and I said, yes, that he had stock of mine and I felt perfectly safe, that the forty shares were as safe as if we had them ourselves." The witness further said that in October, 1907, the plaintiff had again spoken about the stock, and said he wanted the stock returned; that witness wrote to Gallagher, and that he returned forty shares of stock issued in the witness' name; that he had sent the stock "over to Mr. Gallagher in Mr. Ortel's name, and the forty shares were sent back in my name;" that he returned the certificate asking that it be made out in Ortel's name, and that he told the plaintiff that he did not understand why the shares sent were in witness' name, and that Ortel then accused witness of selling his stock. He further testified that the plaintiff did not know Gallagher, but that he asked the witness to place the stock in the hands of a broker to sell. William G. Gallagher, the broker to whom the certificate was sent, testified that he received the certificate sometime after March the 1st, and that it was enclosed in the letter, above quoted, dated March 2nd, 1906; that that *particular certificate* was not sold; but "*the stock was split up and transferred sometime later.*" Answering the question as to why it was split up, the witness said: "Mr. Jones' stock account in my office was handled exactly as my own. I mean by that that Mr. Jones has an account in the office, and he gave me permission, if I saw anything cheap, to buy it, and sometimes I would write that I was going to buy something, and sometimes I would not, it all depended upon the speed necessary in the case. These particular forty shares of stock were transferred in another bundle of stock. Mr. Jones did not give any order for the sale of those forty shares." The witness further said that he had no other order regarding the stock than that contained in the letter of March 2nd, 1906, and that the defendant did not know that the stock had been cut up. He said Doctor Jones asked him to return the original shares, and that he sent him forty shares in the defendant's

Md.]

Opinion of the Court.

name. "I returned a certificate for forty shares of stock for Doctor Jones, but that it was not the identical certificate in Mr. Ortel's name, because I could not return that, that had already been transferred." He was then asked the following question to which the plaintiff objected, and the Court sustained the objection: "Was there any time when there was not forty shares there for Mr. Ortel?" This ruling constitutes the second exception. The witness subsequently testified that he never had an account for the plaintiff on his books. With this outline of the material facts appearing in the record we will now consider the legal questions presented by the appeal.

There was serious error in permitting the introduction of the files of the *Baltimore News* to prove the value of the stock. There was no foundation laid for the introduction of evidence of that character. The mere fact that the *Baltimore News* contained quotations as to the value of the stock did not make those quotations admissible in evidence. In the recent case of the *Mt. Vernon Company v. Teschner*, 108 Md. 158, the circumstances under which evidence of this nature may be admitted were fully considered. After a full review of the authorities upon the subject, CHIEF JUDGE BOYD, speaking for the Court, said: "We are of opinion, therefore, that if it be shown that a newspaper offered in evidence is accepted by the trade as trustworthy and reliable in stating the market prices of the article in question, it should be admitted without requiring evidence of how the information published is obtained, but unless there is some testimony that it is so accepted by the trade, Courts should require evidence as to how the information was obtained by the publishers." In the present case no attempt was made to comply with either of these conditions. The mere fact of the publications seems to have been held sufficient for their introduction in evidence. Apart from these files, there is nothing in the case to show the value of the stock at the time

of the alleged conversion, and, therefore, the ruling was both injurious and erroneous. The defendant was not injured by the ruling embraced in the second exception as it appears by a subsequent answer of the witness that he never had an account on his books with the plaintiff.

This brings us to the rulings upon the prayers and special exceptions. The Court granted the plaintiff's second prayer, and also granted the defendant's third and fourth prayers. It refused the defendant's second, fifth and sixth prayers, and overruled his special exceptions to the plaintiff's second prayer. The jury were instructed by the plaintiff's second prayer that if they found "that the plaintiff being the owner and in possession of forty shares of the capital stock of the Mitchell Mining Company, placed the same in the defendant's hands, to be disposed of by him for the plaintiff at the sum or price of not less than thirteen dollars and fifty cents, or fourteen dollars per share, in cash, and that thereafter the plaintiff demanded of the defendant the return of said stock or the price thereof at thirteen dollars and fifty cents or fourteen dollars per share, and that the defendant refused to return said stock unto the plaintiff, then the plaintiff is entitled to recover such sum as the jury may find to be the value of said stock at the time of such demand and refusal." This prayer was specially excepted to upon two grounds, first, that there was no evidence that the plaintiff instructed the defendant to sell for cash, and secondly, that there was no evidence legally sufficient to show that the plaintiff demanded of the defendant the return of the stock "or the price thereof at thirteen dollars and fifty cents, or fourteen dollars per share." As to the first ground of exception it is sufficient to say that under the facts stated the law presumed a cash sale. "In the absence of a special provision, or understanding to the contrary, a cash sale is generally presumed to have been contemplated." 24 *Am. & Eng. Ency. of Law*, 1095.

As to the second ground of exception it is conceded that the defendant never returned the stock nor did he ever pay

Md.]

Opinion of the Court.

to the plaintiff the price thereof, and while it is true that the plaintiff never demanded, so far as the evidence showed of the defendant, the sum of thirteen dollars and fifty cents or fourteen dollars per share, it is not perceivable how the defendant was injured by the assumption of fact in the prayer. The plaintiff thereby undertook a greater burden than the law imposed upon him, and while the objection is strictly and technically well taken no possible injury resulted to the defendant by granting the prayer in the form in which it was offered. The plaintiff offered evidence tending to prove all the facts stated in the prayer, except the demand upon the defendant for the price of the stock, and as the case must be remanded for a new trial for error committed in the ruling on the first exception the defect complained of may be corrected, unless of course there be other and additional evidence introduced at the retrial of the case which would obviate this objection. The other facts stated in the prayer, and of which the plaintiff had offered evidence, if believed by the jury would have entitled him to a verdict. *Prima facie* a refusal to surrender upon demand by one entitled to possession makes the holding adverse; but the refusal is open to explanation. In *Dietus v. Fuss*, 8 Md. 158. it was said that conversion "may be the direct or constructive, and therefore may be proved directly or by inference. When the plaintiff fails in proving an actual conversion it will be necessary for him to give evidence of a *demand and refusal* having been made at a time when the defendant had the power to give up the goods. A demand and refusal are only evidence of a prior conversion, which may be explained or rebutted by evidence to the contrary." There were sufficient facts and circumstances in the case from which the jury might have found that in March, 1906, the defendant had it in his power to return the goods. He did not deny that at that time it was in his power to have done so, and the testimony of the plaintiff, which we have quoted, indicates that the defendant at that time had control of the stock. The

plaintiff's evidence was that the defendant said in response to his demand for the return of the stock, that it was "all right, and was well locked up." If the plaintiff's testimony be true, the stock was then in the possession of the *defendant's agent*, and no reason is shown why the defendant could not have had it returned. We therefore find no reversible error in granting the plaintiff's second prayer.

The defendant's second prayer asserted that under the pleadings the plaintiff had offered no legally sufficient evidence to entitle him to recover. This prayer raised the question of the legal sufficiency of the declaration, as the defendant was entitled to do by such a prayer under the case of *Ward v. Schlosser*, 111 Md. 532. The declaration, as we have seen, is for the conversion of "forty shares of the capital stock of the Mitchell Mining Company," and the contention is made, upon the authority of *Neiler & Warren v. Kelley*, 69 Pa. St. 403, that trover will not lie for the conversion of shares of stock. The declaration in that case, among other things, alleged the conversion of certain "shares of the stock" of two railroad companies. JUDGE SHARSWOOD said that, "trover can no more be maintained for a share of the capital stock of a corporation than it can for the interest of a partner in a commercial firm. The two cases are precisely analogous." He held that the declaration should have been for a conversion of the certificate of stock. It does not appear that this precise question has ever been directly passed upon by this Court; but a great weight of authority in other jurisdictions is against the Pennsylvania rule. In *Herrick v. Humphrey Hardware Company*, 73 Neb. 809, it was held that trover would lie for the conversion of shares of stock, and many authorities are cited to sustain the conclusion reached by the Court. Commenting upon the case of *Neiler & Warren v. Kelley*, *supra*, the Court said that that "decision dealt with so many judicial niceties that it found no favor either with the Courts generally or with the text

Md.]

Opinion of the Court.

writers; and it is now almost universally held that the action will lie for the conversion of the stock itself, as well as for the conversion of the certificate which evidences it." In *Daggett v. Davis*, 53 Mich. 35, JUDGE COOLEY said: "We see no reason why, if the shares are converted by means of a wrongful use of the certificate, the owner in suing may not count upon the conversion of either." We hold the declaration good, and that the prayer was properly refused.

The defendant's fifth prayer was bad first, because it ignored the evidence of the plaintiff which tended to show that the stock was actually converted by the defendant's agent, and that the defendant received the benefit of his agent's wrongful act. There was evidence in the case from which the jury may have inferred that the defendant participated in Gallagher's act after the plaintiff had demanded the return of the stock. There was great conflict in the testimony of the plaintiff and the defendant; but these controverted questions of fact must be left to the jury under proper instructions. The defendant's sixth prayer asserted that there was no evidence of the time at which the plaintiff claimed the return of the stock. The testimony of the plaintiff, quoted in the early part of this opinion, sufficiently fixes the time of his demand upon the defendant for the return of the stock. This prayer was properly refused.

For error committed in the ruling which constitutes the first exception, the judgment must be reversed, and a new trial awarded.

Judgment reversed and a new trial awarded, with costs to the appellant above and below.

F. EGERTON WEBB ET AL. vs. THE BALTIMORE
AND OHIO RAILROAD COMPANY.

*Laying of Railroad Track in Public Street Cutting Off Access
to Land of Abutting Owner—Proof of Extent of
Injury—Diminution in Market Value.*

When the construction of railroad tracks in a public street destroys or impedes access to the land abutting thereon, the landowner is entitled to recover damages for such injury, since his right to the use of the street for access to his land is a property right.

In such case it is not necessary for the landowner to prove that the rental value of the property has been diminished by the railroad tracks, but he is entitled to recover for a diminution in its market value.

Plaintiff was the owner of a lot of ground abutting for about three hundred feet on a public street in Baltimore City, the bed of which was owned by the municipality. The lot was unimproved and unusued and was elevated above the street level. The street itself was not used as such and was not curbed. Three tracks of the defendant railroad company were laid on the street, leaving a space of about twenty-four feet in front of plaintiff's lot between the nearest track and where the curb would be. When that was the situation of the property, the defendant company, acting under the authority of a municipal ordinance, laid on the street an additional track, leaving between it and the sidewalk line in front of plaintiff's lot only a space of some ten feet, and also raised the roadbed of the street, the result of which was to make impossible any use of the street at that point. In an action to recover damages for the injury to his land so caused, the plaintiff's evidence was to the effect that his lot had a certain market value before the construction of the additional track; that such construction destroyed access from the street, and

Md.]

Argument of Counsel.

in order to obtain access, it would be necessary to devote a part of the lot to that purpose, and that the land remaining afterwards would have a certain market value less than previously. *Held*, that the plaintiff is entitled to recover damages for the injury to his property thus caused; that this evidence is legally sufficient to show the extent of his loss, and that it was not necessary for the plaintiff to prove a diminution in the rental value of the lot, but that proof of the diminution of its market value is sufficient.

Decided December 2nd, 1910.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and PATTISON, JJ.

Randolph Barton, Jr., for the appellants.

The fact that the street had not hitherto been used for street traffic, did not preclude the possibility or probability that it might when occasion arose, be so used. As long as the unobstructed space was there available for traffic purposes, the ability to use this space continued, merely awaiting the time when the city, and especially the abutting lot owners, found it desirable or necessary to do so. The value of the "right of way," which the plaintiffs' property enjoyed in this space along its front, consisted in the right to use, and was not dependent on the question whether that right were then actually being availed of. The impairment or destruction of a right of way appurtenant to improved property, is an actual damage to that property and substantially affects its value,—that is, its potential selling or usable value,—precisely as the possession of any easement is a valuable right, the loss of which must constitute an injury, whether at that time the easement was actually being utilized or not. It was not necessary that the plaintiffs should have sold or leased

their property in order to establish the extent to which it had suffered from the loss of the use of the abutting street,—but that if they can show that the market value of it, while still in their hands, was impaired by the new use made of the street, they could use that as a basis of their claim; and that in this instance they have shown an impairment of market value. Of course the question is not whether the Court, sitting as a jury, agrees with the witnesses, either as to the market values testified to by them or as to the extent to which the new track is responsible for the alleged depreciation. It is purely a question whether, conceding all the evidence to be true and accurate, it is sufficient to support any recovery.

It does not require an expert to prove that impairing or destroying the access to a piece of property is damaging to it; any more than it would require expert testimony to prove that shutting off air or light, or taking away any other easement or privilege from property, is injurious to it. It might even be questioned whether witnesses would be permitted to testify to a fact so patent to everyone. *Western Union Tel. Co. v. Ring*, 102 Md. 681.

Although this Court has said that it is permissible, though not necessary, to prove by witnesses, that smoke, noise, cinders, etc., injure the property reached by them. *Belt Line R. R. v. Sattler*, 100 Md. 333.

Even the mere narrowing of the space available for vehicles would be injurious, much less the practical destruction of it. Of course the exact nature and extent of the obstruction or monopolization of the street by the railroad is material in determining how much injury is caused, but for the purpose of this appeal it is immaterial how great the damage is, if there is any damage.

Defendant seems to confound the question whether, before the laying of this new track, the street was physically usable as a street, with the question whether it was legally so usable.

Md.]

Argument of Counsel.

That the street was legally a street, with all the usual rights therein in the abutting property owners, is admitted. The abutting property owners had all the rights therein that are usually enjoyed by abutting owners. The legal status of the street differed from that of other streets only to the extent that by previous ordinances the city might have granted special privileges therein to the defendant company. It had the right to grant such privileges (Art. 23, Sec. 255), and the abutting property owners had the corresponding right to recover damages every time the city permitted the railroad to monopolize an additional part of the street. But to the extent of the space that remained—some 30 to 36 feet—the rights of the city and of the abutting owners remained unimpaired. Of course if there were already some legal ground on which the abutting property owners could have been prevented from using or were unable to use the street, no damage would be caused them by the putting it to its present use.

The defendant's argument, however, rests purely on the physical condition of the street, and this is purely a question of degree. The space was there, unoccupied. By merely filling in the ditch, which would naturally be done anyhow when the property was graded, the space would have readily been made fit for vehicle travel and thus put in precisely the same condition as the other parts of Ostend street, where a driveway exists between the tracks and the abutting property. It is of course legitimate for defendant to argue that the obstruction or deprivation of an unpaved way such as this is not as great an injury as if it were a much-used, well-paved avenue, but that goes to the question of the amount of the injury, not to that of its existence. Furthermore, it will be remembered that this is a factory neighborhood, where the value of the street to abutting property depends chiefly upon the access which it affords, it being much less material than it would be in a residence neighborhood

whether the street was a smoothly paved one or was adapted for pleasure purposes. For factory purposes it made little difference whether there was a railroad in operation on the opposite side of the street, provided the street immediately adjoining the property in question afforded an ordinary way out for the property by which access to it in vehicles might be had.

So far as the proof indicates, the track is a fixture as permanent as are the three hitherto laid there. Under these circumstances, the damage consists not in the inconvenience suffered by the owner while the track has existed, but in the depressing effect it has on the value of the property in the eyes of future purchasers or users.

The injury is in its nature a permanent one, just as was that caused by the building of a dam in *City of Baltimore v. Merryman*, 86 Md. 584, in which case the Court allowed recovery for the permanent diminution in value. It was not such a "temporary and abatable nuisance" as was the case in *Carroll Springs Co. v. Schnepfe*, 111 Md. 420, where the damage being merely that temporarily caused by the smoke, odors, etc., from the distillery, the Court said that the measure of damages was the annoyance and loss caused up to time of bringing the suit, and not the difference between the value of the plaintiff's land before and that after the injury complained of. A further illustration of this distinction is found in the case of *Western Maryland R. R. v. Martin*, 110 Md. 564, where this Court allowed evidence of permanent depreciation in the value of plaintiff's land due to the construction of a railroad culvert. This is the general rule. See 29 Cyc., 1275.

That the laying of a track such as this is to be treated as permanent in its effect is practically declared by our statute.

Code, Article 23, section 255, provides that the abutting property owner in such cases can recover his damages, provided he sues within two years from the completion of the

Md.]

Argument of Counsel.

track. Manifestly this recognizes the injury not as a "temporary, abatable one," but as a permanent one, to be paid for once for all or not at all.

The case is almost precisely analagous to that of *Lake Roland El. Ry. Co. v. Frick*, 86 Md. 259, where the Court (plaintiff's first prayer), allowed the jury to consider the depreciation in market value of the property.

The practical hardship that would result in this case from any other view is apparent on reflection. As has just been pointed out, the statute (Article 23, section 255), while allowing an action to be maintained by any one injured by the laying of such a track, limits the time for bringing suit to two years. If suit were brought under the common law, in accordance with *O'Brien v. Belt R. R.*, 74 Md. 375, there would also be applied a Statute of Limitations to the right of an owner to sue for damages caused by the laying of such a track.

If, therefore, plaintiffs could not establish an injury until they could show that they actually wished to use the street, their right would doubtless be barred by limitations before they were able to sell or improve. When they did get ready to develop the property they would find that they had waited too long to sue for the injury caused by loss of its means of access.

How can the Court say, as matter of law, that there is no legally sufficient evidence of damages? Is not the Court practically usurping the jury's functions in doing so? When we analyze the methods by which the witnesses state that they arrive at their conclusions, these certainly seem logical and reasonable. After all, a criticism of their reasons merely goes to the weight of their testimony—to its accuracy and credibility. But as a matter of fact, in what other way would it be possible to prove the "value" of an unimproved, undeveloped lot? We cannot prove offers (102 Md. 679) as evidence of value. What else would any witness say when

asked to value a piece of vacant ground? The witnesses simply did what this Court says they may do. *Belt Line R. R. v. Sattler*, 102 Md. 602.

Duncan K. Brent (with whom was *Allen S. Bowie* on the brief), for the appellee.

Ostend street at the point in question at no time, has ever been used for street purposes, or as a thoroughfare, or has it been even possible to drive a wagon along it. Such being the case under the undisputed evidence, how can the plaintiff say that he has been damaged by the taking away from him a thing which has never existed? It is true that Ostend street is a street, and can at any time be improved for street purposes by the Mayor and City Council of Baltimore, but up to this time it is not a traveled street. Practically it is no street at all, and has never been in a condition to be used as such. If, therefore, it has never been possible to use any portion of the street bed at this point for the passage of vehicles, how can the plaintiffs' property have been cut off from such use of the street, so as to be at this time injured and depreciated in value? It is hard to see how, under these facts, the plaintiffs' property has been injured at all. The whole case was tried, however, on the theory that before the new track was laid Ostend street was an actually used thoroughfare and driveway. For example, the witness Newbold distinctly says that he values the plaintiffs' property at \$3 a front foot before the new track was laid because it fronted on a 24-foot driveway in Ostend street. Hurst, the other expert for the plaintiff, also frankly says that the value which he places on the property before the new track was laid is based on the supposition that Ostend street was a street capable of being used by wagon and traffic.

If it can be held that the plaintiffs' claim for damages is not limited to existing present damages, but also covers such damages as may arise in the future, we do not see how a Court of law can at this time deal with the question of such

Md.]

Opinion of the Court.

damages without entering the dimest realms of speculation. It will not do to say, that while it may be true our property has not been damaged up to this time by reason of the laying of the new track, yet when the Mayor and City Council open Ostend street to traffic so that it can be used as a thoroughfare, then the new track will actually deprive us of egress and ingress to our property, and be a real obstruction to the traffic of the street, all of which will depreciate our property.

PEARCE, J., delivered the opinion of the Court.

The appellants, being tenants in common of two adjoining unimproved lots of land in the City of Baltimore, brought this suit at law against the appellee, the Baltimore and Ohio R. R. Co., for alleged injury to their fee simple estate in said lots of land, resulting from the laying by the appellee of an additional track on Ostend street upon the north side of which street said lots abut.

The declaration alleges that Ostend street is a public highway upon which for many years the appellee has maintained its railroad tracks in front of the plaintiffs' said property, and on which it operated a steam railroad, but that the northern part of said street, for a width of about twenty feet, has been until recently, unobstructed by tracks, or in any other manner; that recently in virtue of an ordinance of the Mayor and City Council of Baltimore, the defendant has laid an additional track on the north side of said street immediately in front of the appellants' said property, and has raised the roadbed of the street under said track which is to be used in operating the trains of the appellee; that in consequence thereof the general public has been entirely obstructed from the roadbed of said street in front of the appellants' property for the whole distance between Russell and Ridgely streets, and it is not possible to use any portion of said street bed in front of their property for the passage of vehicles; that thereby their property has been entirely deprived of the use of Ostend street for the passage of vehicles, and its value

greatly injured and depreciated, not only by such obstruction of the street, but also because the trains of the appellee will be much nearer to their property, with greatly increased noise, dirt and danger, affecting its rental as well as its *salable* value; and that though the said ordinance authorized said obstruction, yet by the express terms of the Code, Art. 23, sec. 255, the appellee is liable in damages for the injury occasioned by such location of said track.

The appellee pleaded that it did not commit the wrong alleged, and the case was tried before the Court without a jury, resulting in a verdict for the defendant under the instruction of the Court, and from the judgment on the verdict the plaintiffs have appealed.

It was admitted that the plaintiffs had title to the property in question, and that Ostend street was a street owned by the Mayor and City Council, with a right of control over it by them, and a copy of the ordinance referred to was admitted in evidence authorizing the laying of the track in question. It was also admitted that the track on Ostend street between Russell and Ridgely streets was laid between May 1st and December 1st, 1908.

Mr. Sutton, a surveyor who made a plat of the *locus in quo* used in his examination, testified that there were three tracks in use at that point before the laying of the track in question, making now four in all, of T rail construction, and so laid that wagons cannot use the part where the tracks are laid; that the plaintiffs' lots at that point are not graded, being elevated above the street, and that there is an open ditch some fifteen feet south of the north side of Ostend street, and no sidewalk or actual roadway, but a slope from the ends of the cross-ties of the new track to the bottom of the ditch, and from thence a slope up to the north building line of Ostend street; that it is 66 feet from the north rail of the new track to the north building line of Ostend street, and that the rule has always been to allow one-fifth of the

Md.]

Opinion of the Court.

total width of the street for a sidewalk on each side, leaving three-fifths for the roadbed between the curbs, and that he had known Ostend street for twenty-five years, and has never at anytime seen it used as a street between Russell and Ridgely streets; there are no houses on Ostend street between Russell and Ridgely, but west of Ridgely there is a row of houses on the north side of Ostend street set back a few feet from the building line, with a narrow brick walk in front. East of Russell street, Ostend has not been opened for passage of vehicles north of these tracks, but south of the tracks there is a travelled way, part of which he thinks is on private property.

The plaintiffs then called Messrs. David M. Newbold, Jr., and John J. Hurst. Mr. Newbold is an attorney, associated with his father in real estate development in Baltimore City, and has known the property in question since 1905, and has frequently examined the property, and kept in touch with sales in that neighborhood, as the representative of the plaintiffs. Their property fronts 310 feet on Ostend street. One-half of this frontage runs back 264 feet on Ridgely street to Stockholm street, and the other half runs back on Russell street 100 feet towards Stockholm street. The property in the rear of this latter half on Stockholm street is the only improved property in that block and does not belong to the plaintiffs. Mr. Newbold said he knew the value of this property May 1, 1908; that 264 feet on Ridgely and 100 feet on Russell, 364 feet at \$3.00 a foot capitalized, is \$50, about \$18,200. That was a fair value at that time. Property in that neighborhood has sold from \$2.00 to \$4.25 a front foot. This property is adapted for factory or commerical purposes, or for dwellings. It would cost about \$3,000, or fifty-five cents a foot, to grade it, and he took that in account in his estimate of \$3.00 a foot. After the new track was laid the property was worth about \$15,800. Before that, there was about 24 feet between the former north track and where the

curb would be, affording adequate space for a wagon to drive between the track and curb, and to load and unload. Now the space is reduced in one place to ten feet. He estimated that after the blocking of the street by the new track, in order to restore the twenty-four foot space between the old north track and the place for the curb, it would be necessary to take off fourteen feet of the property on Russell and the same on Ridgely streets, thus moving back the whole Ostend street front. This reduces the combined frontage on Ridgely and Russell streets from 364 to 336 feet, or twenty-eight feet, which at the former valuation of \$50 a foot, makes a loss in value of \$1,400, to put the property in the same relation to Ostend street which it bore before the new track was laid.

Mr. Hurst is also an attorney devoting most of his time to real estate development and admitted by the defendant to be an expert in that line. He knows this property and owns three houses on the south side of Ostend street west of Warner street which is the next street east of Russell. He testified that if he owned the plaintiffs' property he would set aside from Ostend street enough to make up what was taken from the bed of the street by the railroad's last track, and would arrive at the value of that by valuing the amount of land left. His method of valuation was not precisely the same as Mr. Newbold's, but the result was the same, viz, a loss of \$1,400.

Upon this testimony the plaintiffs rested, whereupon the defendant offered, and the Court granted, the following prayer:

"The defendant prays the Court to rule as a matter of law, that under the pleadings in this case there has been offered no evidence of damages to the property of the plaintiffs *of such a character as to be* legally sufficient to entitle the plaintiffs to recover, and therefore its verdict must be for the defendant."

Md.]

Opinion of the Court.

The exception to this ruling presents the only question raised by the record.

The position of the defendant in its argument has, as we think, been correctly epitomised in the appellant's brief in these words: "The street at this point was not actually in use as a street, but was devoted exclusively to railroad purposes as fully as though it were a private railroad right of way. The plaintiffs' property never had used it, could not use it, unless some filling up of the ditch was done, and might never have occasion to use it. The plaintiffs' property was unimproved before the new track was laid and is unimproved now. It has not changed hands or been sold or leased, since, and there is no sufficient proof either that the new track has depreciated its value, or if so, to what extent the depreciation has gone."

We think that view of the situation leaves out of consideration the primary purpose for which streets are opened and laid out, and the obligation of the municipal authorities to preserve the beneficial enjoyment of the streets by the abutting landowners as a constituent part of the general public. In *Lake Roland El. R. R. Co. v. Baltimore City*, 77 Md. 377, JUDGE BRYAN said: "The control of the city over the streets is attended with the duty of preserving them for their legitimate purposes. They are intended for the passage of people over them, on foot, on horseback and in vehicles, on their various occasions of business, convenience, or pleasure. It is not competent for the city to defeat the primary purpose for which they were dedicated to the public use"; and JUDGE ALVEY, in an opinion in the same case overruling a motion of the appellant for a reargument, said: "The primary use of the streets is not, by any means, that of furnishing tracks for street railways. The Mayor and City Council cannot divest themselves of this trust, nor can they so restrict their power over the streets as to defeat, or seriously impair, the beneficial enjoyment of the streets by the public in the ordinary and usual modes of passage thereon." That case was

approved in *Poole v. Falls Road R. W. Co.*, 88 Md. 538, and in *C. and P. Tel. Co. v. Baltimore*, 89 Md. 710, and the principle thus declared we do not understand to be questioned by the appellees, though its application to the case at bar is apparently denied. As will be seen hereafter, however, we are of opinion that it has direct application to this case, and that it may be regarded as conclusive of this plaintiff's right to recover.

We have given very careful consideration to the cases relating to the recovery of damages for cutting off access to one's property, and especially in reference to the *character* of proof which will warrant recovery in such cases, though the appellees have not cited either in their brief or in the oral argument any authorities for their position, but have contented themselves with the statement of general principles deemed by them to be applicable and controlling. It is of course understood that for any injury to real property the plaintiff must, as in other cases, produce evidence to show the extent of loss, as a basis for the assessment of damages, beyond nominal damages, and we think that has been done in this case. We have found one case which apparently sustains the view of the defendants' counsel in this case, and we will briefly refer to it here. In *Rumsey v. New York and New England R. R.*, 133 N. Y. 79, the plaintiff was the owner of a parcel of land with a front of about 1,000 feet on the Hudson river, upon which was a brick yard, and the bricks made on the premises had been for many years hauled to the river shore and there loaded upon vessels for shipment to market. This use was discontinued about 1875, and thereafter there were on the premises no buildings or machinery for brick making. In 1881 the defendant constructed a new roadbed along the plaintiffs' whole front, the effect of which was to cut off the plaintiffs from access to the river from their lands. The Court held "that the proper measure of damages in such a case is the diminished *rental or usable* value of the property as it was, in consequence of the loss by

Md.]

Opinion of the Court.

the defendant's acts of access to the river, in the manner enjoyed by the owner prior to the construction of the embankment across the water front by the defendant. The plaintiffs cannot be permitted to prove, or allowed to recover damages that they might have sustained, if they had put the property to some other use, or placed other structures upon it. The damages could not be based upon the *rental or usable* value of the property for a brick yard, any more than they could be based upon their use for some other specific or particular purpose to which they were not in fact put by the owners. The question is, what damages did the plaintiff in fact suffer by having the access to the river cut off? Not what they might have suffered had the land been devoted to some particular purpose to which it was not put. The proof of damages on the part of the plaintiff consisted entirely of the opinions of witnesses as to the *rental* value of the land in the absence of the structure built by defendant. This proof was competent as far as it went, but it did not establish the legal measure of damages. It should also have been shown what was the *rental or usable* value of the premises as they were with the obstruction which interfered with the access to the river, as the difference in these two sums represented the actual loss caused by the defendant. * * * The method adopted of establishing the plaintiff's damages demands a reversal of the judgment."

The Court in that case, however, proceeded to say that there was no distinction to be made between the rights which pertain to an owner of land upon a public river, and one upon a public street, and declared its approval of a long line of decisions in that State, holding that an owner of land abutting upon a public street, has "a *property right* in such street for the purposes of access, etc., * * * and that when a railroad laid in said street, without condemnation proceedings, injuriously affects such property right, it is responsible for any damage resulting therefrom."

If the above case is to be understood as meaning that rental and usable value *in that case* were equivalent terms, and as excluding saleable or market value in such cases, we cannot adopt such limitation of proof of damage. If, on the other hand the case is not to be so understood, and usable value was to be understood as saleable or market value, then the proof made in the case before us conforms to that understanding, and that case cannot be regarded as an authority against the plaintiffs' right to recover in this case.

But if it were conceded to be adverse to the right of recovery in this case, we could not adopt it as authority without departing from the principles established in decisions in this State which we regard as sound and as applicable to the case before us.

In *Lake Roland El. R. W. Co. v. Webster*, 81 Md. 529, the appellee rented from Wm. H. Birch a lot on North street, in Baltimore City for a term of five years at the annual rent of twelve hundred dollars. The elevated railroad was in the middle of the street, not directly in front of the rented premises, but beginning twelve feet from the Northern boundary. The lot was occupied by a livery stable kept by the plaintiff, and he rented the property for that purpose. After the completion of the elevated structure the landlord reduced the rent to nine hundred dollars. But the plaintiff, contending that this reduction did not measure his loss, sued the railway company and obtained a judgment for \$1,000 which was affirmed on appeal. The trial Court granted the following prayer to the plaintiff: "If the jury shall find from the evidence that the rental value of the premises occupied by the plaintiff as tenant of Wm. H. Birch under the written lease offered in evidence, has been diminished by the construction and use of the elevated railway of the defendant corporation on North street, then the plaintiff is entitled to recover, and the measure of damages is the amount which the jury shall find said rental value has been so diminished."

Md.]

Opinion of the Court.

In passing upon this prayer the Court said: "If the jury found that the *usable* value of the property was destroyed or diminished by the cause alleged they were justified in finding a verdict for the damage done. Great exception is taken to the language of this prayer. But it seems to us that its fair meaning is that the jury are to find the damages which the plaintiff sustained, as tenant of the premises, by the diminution of its rental value. It could not easily be construed as meaning that they were to find the damages which the landlord had suffered." We have referred to this prayer, and to the language of the Court in considering it, because it emphasises the distinction between that case and present case, and because the Court in italicising the word *usable*, in its consideration of the prayer, indicates clearly that if the landlord, the owner of the property, had been suing in that case, he could not have been limited in his proof to the usable value of the property in the condition in which it then was, as apparently held in the *N. Y. case, supra*, and as contended by the appellees in this case; but could have recovered the damages which *he* suffered, namely, the diminished saleable value.

In *Lake Roland Co. v. Frick*, 86 Md. 259, Robert Garrett was the owner in fee of a vacant lot on North street, and the elevated railway was in front of a portion only of this lot, and impaired the access thereto, thus diminishing its value. The plaintiffs' first prayer which was granted, after setting out the necessary preliminary facts, instructed the jury "and if they shall further find that the said structure in front of said lot impaired the access to said lot originally afforded by said street, and rendered the said lot or some part of it less advantageous for building purposes than it was previously, and made the *market value* of said lot in the lifetime of said Robert Garrett less than it would have been if said structure had not been so erected in front thereof, then the plaintiffs are entitled to recover in this action

the amount of such depreciation thereby given to said lot." The testimony upon which that prayer was based was the testimony of A. L. Gorter, who said he knew the market value of the lot before the railroad was built, and its market value after it was built, and that after it was built, its value was diminished to the extent of \$15,000. Other witnesses also testified to the diminution of value by the construction of the railroad. There was a verdict for the plaintiff, and judgment thereon, which was affirmed on appeal.

We can discover no material distinction in principle between that case and the present. We may assume, that North street was a more improved street than Ostend street, at the point where the present plaintiffs' property is situated; that there were houses and sidewalks on North street at that point, and that the bed of the street was paved with some material. There may have been better and more convenient use of the street, and access thereto from the abutting property on North street, but that would go only to the quantum of injury, and would not distinguish the cases in principle. The *right* of access is the test of the *right of action* in such cases.

The character of the testimony given in the present case by Messrs. Newbold and Hurst was the same as that given by Mr. Gorter in the *Lake Roland case*. Both went to the diminished market value of the property. The method of arriving at the amount of damage done, pursued by Messrs. Newbold and Hurst, we do not think was open to objection, and it was admitted without objection. We think it a natural and legitimate mode of estimating the damage. There was evidence tending to show that the construction of the additional track destroyed the right of access to plaintiffs' property on that street, and certainly, *one* legitimate method of ascertaining the resulting damage was to ascertain what it would cost the plaintiffs to restore the means of access by devoting a part of their property to that purpose. In 8

Md.]

Opinion of the Court.

Amer. and English Enc., 2nd Ed., 547, note 8, it is said that where the case admits of it, the injured party may resort to different means of arriving at the result, to be judged of by the jury under proper instructions. Thus in *Seely v. Alden*, 61 Pa. St. 302, where damages were claimed as the result of the deposit of tan bark in a mill pond, the damages were held measurable either by proof of the difference in value of the property with, and without the deposit, or by the cost of its removal and the restoration of the property to its former situation.

And in *Gas Light Co. v. Colliday*, 25 Md. 1, where the action was for damages by severing the pipe which conveyed gas to the property of the plaintiff, it was held the jury might consider the diminution of value of the property for sale or lease and the cost of restoring the premises.

For the reasons stated, we think there was error in granting the prayer withdrawing the case from the jury.

*Judgment reversed and new trial awarded
with costs to the appellants above and
below.*

ALBERT J. LONG, EXECUTOR, vs. SALLIE L.
HAWKEN.

*Non-Resident Witness or Party to Suit Exempt from Service
of Process—Appeal.*

When a non-resident, who is a party defendant in a suit, comes into this State for the purpose of testifying at the trial, or of defending the suit, he is exempt from the services of process in another civil action against him, while in attendance upon the trial, and for a reasonable time in coming and returning. Upon appeal from an order quashing a writ of summons, it is not necessary that there should be a bill of exceptions, when the record contains the motion to quash, the answer, and the affidavits filed, and shows what questions were decided by the trial Court.

Decided January 10th, 1911.

Appeal from the Circuit Court for Washington County
(KEEDY, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

Albert J. Long (with whom were *Scott M. Wolfinger* and *Leon R. Yourtee* on the brief), for the appellant.

Alexander Armstrong, Jr., and *John Ridout*, for the appellee, submitted the cause on their brief.

BRISCOE, J., delivered the opinion of the Court.

The question presented on this appeal is a narrow one, and concisely stated, is this: Is a non-resident party defendant

Md.]

Opinion of the Court.

who comes into this State for the purpose of defending a suit pending against him, exempt from service of civil process for the commencement of a civil action against him in this State. In other words, whether a civil summons can be served upon a defendant, a non-resident of the State, for another (new) action, while he is attending on Court in this State as a party defendant, in an action pending against him.

It seems to be clear, that whatever may be the rule in other jurisdictions, it is settled in this State, that a non-resident witness is exempt from service of civil process as well as arrest, while attending on the Courts of the State.

In the early case (1799) of *Brookes v. Chesley*, 4 H. & McH. 295, it was held in keeping with the common law rule, "that jurymen and witnesses, during their attendance on Court, are privileged from arrest." 3 *Blackstone Commentaries*, 289; 1 *Greenleaf Evidence*, sec. 316-320.

In *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, it is said: A witness is protected from arrest on any civil process while going to the place of trial, while attending there for the purpose of the cause and while returning home; *eundo, morando, et redeundo*; and it matters not whether he attends voluntarily or by compulsion. And this is the rule, whether the privilege be regarded as a personal one to the witness or the privilege of the Court. 2 *Taylor's Evidence*, sec. 1139; *Greenleaf Evidence*, sec. 316; 1 *Wharton's Evidence*, sec. 389.

And in *Bolgiano's Case*, *supra*, it was further said that a resident of another State, who comes into this State as a witness to give evidence in a case pending here, is exempt from service of process for another suit. JUDGE MILLER, who prepared the opinion in that case, said: The decided weight of authority has extended the privilege so far, at least, as to exempt a resident of another State, who comes into this State, as a witness to give evidence in a cause here, from service of process for the commencement of a civil action

against him in this State, and that the privilege protects him in staying and returning, provided he acts *bona fide* and without unreasonable delay. A large number of cases were cited in support of the doctrine here announced but we find it unnecessary to cite them.

But it is insisted that a different rule applies to a non-resident party defendant, and inasmuch as the appellee, in this case, a non-resident of the State was present as a party defendant, she was not exempt from service of the summons, which had been issued by a Court in this State, and which was served on her, while in the State.

There is considerable conflict of authority in the cases upon the general question here involved and the Courts are far from being in accord or harmony in the decisions. In 32 *Cyc.*, Vol. 32, page 492, the doctrine is thus stated: Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending Court whether under summons or subpoena or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going. The rule is by most Courts held to apply equally well to suitors and witnesses attending Court in the States.

In the case of *Bolghiano v. Gilbert Lock Co.*, *supra*, this Court, in referring to this privilege or immunity, said: But does it protect a witness or a party from service of a summons in order to secure his appearance to an ordinary civil suit? On this question there has been some conflict of decision. The tendency, however, of the Courts in this country is to enlarge the privilege and to afford full protection to suitors and witnesses, from all forms of process of a civil nature during their attendance before any judicial tribunal and for a reasonable time in going and returning. The reason for the exemption is placed by the New York Court of Appeals and by JUDGE COOLEY in the *Michigan Case*, on the ground of public policy and the due administration of jus-

Md.]

Opinion of the Court.

tice. The general rule as announced by this Court in *Bol-giano case*, that a non-resident party defendant was also exempt from the service of process has been approved by a long line of well considered cases in other jurisdictions and is supported by the great weight of authority in the State and Federal Courts.

In *Matthews v. Tufts*, 87 N. Y. 568, the Court said: In *Van Lieuw v. Johnson*, decided March, 1871, and referred to in *Person v. Grier* (66 N. Y. 124), a majority of the Court were of opinion that a summons could not be served upon the defendant, a non-resident of the State while attending a Court in this State as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority.

In *Mitchell v. Huron*, 53 Mich. 541, JUDGE COOLEY, put the exemption of a non-resident party defendant, upon the ground, of public policy, the due administration of justice, and protection to parties and witnesses alike demand it.

In *Person v. Grier*, 66 N. Y. 124, it was said, in approving the doctrine that a party was exempt, that "this immunity is one of the necessities of the administration of justice." The following cases hold, that a non-resident party defendant is exempt from the service of process: *Durgan v. Miller*, 8 Vroom, 182; *Massey v. Colville*, 45 N. Y. Law, 119; *Miles v. McCullough*, 1 Binney, 77; *Wilson v. Donaldson*, 117 Ind. 356; *Mitchell v. Huron*, 53 Mich. 541; *First Nat'l. Bk. of St. Paul v. Ames*, 39 Minn. 179; *Palmer v. Rowan*, 21 Neb. 452; *Huddeson v. Prizer*, 9 Phila. 188; *Bolz v. Crone*, 64 Kansas, 571; *Halsey v. Stewart*, 1st Southard (4 N. J. L.), 420; *Andrews v. Lembeck*, 46 Ohio State Rep. 40; *Hayes v. Shields*, 2 Yeates, 222; *In re Healey*, 53 Vt. 694; *Gregg v. Sumner*, 21 Appellate Ct. of Ills. 110; *Martin v. Bason*, 76 Arkasas, 160; *Rorer Inter-State Law*,

page 26; *Cooper v. Wyman*, 122 N. C. 785; *Murray v. Wilcox*, 122 Iowa, 189; *Cameron v. Roberts*, 87 Wis. 291.

The decisions of the Federal Courts are to the same effect. *Skinner & Mounce Co. v. Waite*, 155 Fed. Rep. 828; *Nichols v. Horton*, 14 Fed. Rep. 330; *Juneau Bank v. McSpedan*, 14 Fed., Case No. 7582; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Lyell v. Goodwin*, 4 McLean, 29; *Small v. Montgomery*, 23 Fed. Rep. 707; *Atchison v. Morris*, 11 Fed. Rep. 582.

In *Wilson Machine Co. v. Wilson*, 22 Fed. Rep. 80, it is said: "It is important to the administration of justice that each party to the suit should have a free and untrammelled opportunity to present his case, and that non-resident defendants should not be deterred by the fear of being harassed or burdened with new suits in a foreign State from presenting themselves in such State to testify in their own behalf or to defend their property." * * * "There is, perhaps, a reason why a plaintiff, who has voluntarily sought the aid and protection of our Courts, should not shrink from being subjected to their control, which does not apply to the condition of a defendant whose attendance is compulsory."

The motion to quash the summons and the return of the sheriff in this case is based upon the allegation, that the defendant is now, and had been a resident of the District of Columbia and was not a resident of the State of Maryland when and where the summons had been issued and where the process had been served. It is further alleged, that the appellee was present in the Circuit Court for Howard County, on the 24th day of September, 1909, for the sole purpose of attending on that Court as a party defendant and testifying as a witness, at the trial of a case, wherein the appellant was plaintiff, and the appellee was defendant.

By the fourth paragraph of the petition it is averred, that at the time and in the place mentioned while the Circuit Court for Howard County was actually engaged in the trial

Md.]

Opinion of the Court.

of the case, and while she (the appellee), was in the actual presence of the Court as such party defendant and witness, and while she was sitting within a few feet of her attorneys who were engaged in the conduct on her behalf of the trial of the case, and waiting to be called and sworn to testify as a witness in the case, and within fifteen minutes of the time when she actually did take the stand and testified as a witness in the case and while within the State of Maryland, and in attendance upon the Court for this and for no other purpose, the summons in this case was illegally served upon her, in violation of her rights and privileges as a party defendant and a witness in the case.

The plaintiff (the appellant) in his answer to the defendant's motion, admits the allegations set out therein, but denies that the defendant was present and attending the trial, as a witness, or for the purpose of testifying as a witness in the case. There were other averments, in the answer, but as we do not think they reflect upon the decision of the case, they need not be set out here.

There is nothing, we think, in the facts of this case, that could take it out of the general rule, as established by the decisions cited by us, or would deny to the appellee the immunity and exemption from service of process which she claims and sets up, both as a witness, and as a party defendant, while in attendance upon the Circuit Court for Howard County.

The case of *Mullen v. Sanborn*, 79 Md. 364, relied upon by the appellants is entirely dissimilar to this case. In that case, the Court denied the non-resident plaintiff the immunity and privilege claimed by him upon the peculiar circumstances and facts existing in that case. It was distinctly said, that *Mullen's case*, *supra*, was unlike *Bolgianno's case*, *supra*, and the cases therein cited.

As to the motion to dismiss the appeal we need only say, that the appeal is from the order and determination of the Court, in granting the defendant's motion to quash the sum-

mons and the return of the sheriff thereon, and in such cases the appeal brings up the record for review by this Court. *Schaeffer v. Gilbert*, 73 Md. 66; *Coulborn v. Fleming*, 78 Md. 210.

When the motion rests on questions of fact, the evidence ought to be certified and presented by bills of exceptions properly authenticated and filed in the case. *Dumay v. Sanchez*, 71 Md. 512; *Palmer v. Hughes*, 84 Md. 659; *New & Sons v. Taylor*, 82 Md. 40.

In the present case there was no bill of exceptions but the record itself discloses the questions passed upon and decided by the Court below. The motion to dismiss will be overruled.

In conclusion, we hold, that the appellee, under the facts of this case, was clearly entitled to the immunity and privilege claimed, both as a witness and a defendant suitor, while attending the sessions of the Circuit Court for Howard County, and for the reasons given, the order of the Court below will be affirmed.

Order affirmed, with costs.

Md.]

Syllabus.

LULA W. SUMAN ET AL. vs. JAMES W. HARVEY ET AL., EXECUTORS OF ROSE A. HARVEY ET AL.

Devise and Legacy—Parol Evidence of Declarations of Testator—Gift to Persons Entitled as Heirs at Law and Next of Kin—Descent and Distribution—First Cousins Entitled, to Exclusion of Child of Deceased First Cousin.

Evidence of the declaration of a testator as to his purpose in making his will, or as to what persons would take under it, is inadmissible to affect the construction of the will.

When a testator gives his estate to those persons who would be entitled thereto under the laws of the State as his next of kin and heirs at law, and he leaves surviving him first cousins and the children of a deceased first cousin, no evidence is admissible to show that he intended that a share of his estate should go to the children of the deceased first cousin, such children not being entitled under the Statute of Distribution to take as heirs at law or next of kin.

A devise to the heirs of the testator is held to mean those persons who answer that description at the time of the death of the testator.

Under Code, Art. 46, sec. 27, relating to the descent of real estate, and Art. 93, sec. 129, relating to the distribution of the personal property of decedents, no representation among collateral kindred is allowed after brothers' and sisters' children. And upon the death of a person intestate leaving as his nearest relations certain first cousins, and also the children of another first cousin who died before the testator, these latter do not take by representation the share of their deceased parent, but the whole estate, real and personal, passes to the first cousins.

Decided January 10th, 1911.

Appeal from the Circuit Court No. 2 of Baltimore City (LEHMAYER, J.). The same question was involved in the appeal of Christina Johanna Hettinger against the same appellees from a decree of the same Court made by DOBLER, J.

The causes were argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Thomas Mackenzie, Albert C. Ritchie and Frank E. Welsh, Jr., (with whom was Thomas Hughes on the brief), for L. W. Suman et al., appellants.

Bernard Carter and Jacob M. Moses, for Christina J. Hettinger, appellant.

Joseph C. France, Vernon Cook, Charles McH. Howard, Charles A. Marshall and George Moore Brady, for the appellees.

THOMAS, J., delivered the opinion of the Court.

Mrs. Rose A. Harvey, of Baltimore City, died in August, 1909, seized and possessed of a large real and personal estate, which she disposed of by last will and testament as follows:

"After the payment of all my just debts and funeral expenses, I give, grant, devise and bequeath all my property and estate, of whatsoever kind, and wheresoever situate, to my executors hereinafter named, and I direct that all my said property and estate shall be converted into cash as soon as conveniently may be after my decease, without making a sacrifice thereof, and for that purpose I hereby authorize and empower my said executors, and the survivor of them, to sell and dispose of all my personal property and real estate, including ground rents, at public or private sale or sales, for

Md.]

Opinion of the Court.

such price or prices, and upon such terms and conditions as to them may seem best, or to the survivor of them; and to grant and convey the real estate and ground rents to the purchaser or purchasers thereof, his, her or their heirs and assigns, free from all liability for or on account of the application of the purchase money. And I further direct my said executors, and the survivor, from time to time, as to them seems best, as my estate shall be converted into cash, to distribute the proceeds thereof among my heirs at law and next of kin, who may be entitled thereto under the laws of Maryland."

After the will had been admitted to probate in the Orphans' Court of Baltimore City, and letters testamentary had been granted to James W. Harvey and the Safe Deposit and Trust Co. of Baltimore, the executors named therein, Lula W. Suman, assignee of Caroline E. Suman and Sophie J. Day filed a bill in Circuit Court No. 2 of Baltimore City, against the executors and Lewis W. Suman, Amelia Boyd, Henrietta Watts, Barbara C. Gettier, Charles F. Wells and William R. Suman, in which, after stating that Mrs. Harvey died leaving said will and seized and possessed of a large real and personal estate, and that she acquired a part of the real estate by inheritance from her father and brother and the balance by purchase, they allege that the testatrix left as her nearest relatives, "four first cousins, namely: Amelia Boyd, Henrietta Watts, Barbara C. Gettier and Charles F. Wells," and four children of another first cousin, Caroline E. Suman, deceased, namely: Sophie J. Day, one of the plaintiffs, and Caroline E. Suman, assignor of Lula W. Suman, the other plaintiff, and Lewis W. Suman and William R. Suman; that they are "advised and therefore allege" that under the Maryland statutes of descent and distribution, "there is no representation among collaterals beyond the children of brothers and sisters of the deceased but that said statutes have no application to the provisions of

said last will and testament.” That by a proper construction of the terms of said will as well as by virtue of the declaration of the said testatrix, “that it was her intention to leave her estate, so that the aforesaid children of the said Caroline E. Suman, the elder, would take the share their mother would have taken if living,” the plaintiffs are entitled to share in the distribution of the estate. After suggesting several constructions of the will, the bill then proceeds as follows: “Your oratrices further show that the testatrix fully intended to and supposed she was providing by her will for the children of Caroline E. Suman, the elder, exactly the same interest the said Caroline E. Suman would have taken as an heir at law and distributee of said Rose A. Harvey, had said Caroline E. Suman, the elder, been living at the time of the decease of said Rose A. Harvey, and had the latter died intestate. But your oratrices show that through the agencies of some one or more persons, unknown to your oratrices but intending to secure by the expressions found in said will some benefit to themselves and others to the exclusion of your oratrices, the said Rose A. Harvey was misled into believing that the language in said will did in fact provide for the children of said Caroline E. Suman, the elder, as aforesaid. That your oratrices are unable to aver with any greater certainty the persons or instrumentalities through which the said result was accomplished, as the same is within the peculiar knowledge of the defendants, or someone or more of them and can only be obtained from answers and evidence and a discovery thereof from the defendants. That in consequence of the aforesaid facts, your oratrices are advised and therefore allege that they are entitled to have this Court treat the parties ostensibly entitled under the language of said will as trustees for the children of said Caroline E. Suman, the elder, to the extent of the interest, as aforesaid, that the said Rose A. Harvey, intended to confer upon them by the language of said will and testament,” etc.

Md.]

Opinion of the Court.

The prayer of the bill is for a construction of the will; that a trust "may be declared to exist in favor of the said children of Caroline E. Suman, the elder," and that the "defendants may be required to make discovery of all the matters and facts pertaining to the making" of said will, etc. The executors and the four first cousins of the testatrix demurred to the bill, on the grounds: (1) that it does not state such a case as entitles the plaintiffs to any relief against them, and (2) that it does not appear from the bill that the plaintiffs have any such interest in the estate as entitles them to the relief prayed, and the appeal in No. 11 Appeals is from the decree of the Court below, sustaining the demurrers and dismissing the bill.

On the 11th of November, 1909, the executors filed a bill in said Court against the said first cousins of the testatrix, the husband of Mrs. Watts, and any unknown heirs or next of kin of the testatrix, setting out the provisions of the will, giving a statement of the personal and real estate left by the testatrix, showing that she acquired a part of the latter under the will of her father, a part by inheritance from her brothers and that she purchased (bought) the balance, and alleging that to the best of their "knowledge, information and belief the nearest relatives of said testatrix, living at the time of her death, were her four first cousins, the defendants Amelia M. Boyd, widow of James Boyd, deceased, Mary Ann Henrietta Watts, wife of Benjamin Watts, Barbara P. Gettier, widow of John Gettier, deceased, and Charles F. Wells." The plaintiffs further state: "That doubts have been suggested as to the true construction of said will, as to how the beneficiaries among whom the proceeds of said estate is to be divided by your orators shall be ascertained; especially as to whether such distributees shall be ascertained in whole or in part, according to the laws of this State regulating the descent of real estate, or according to the laws regulating the distribution of personal property; the real estate whereof

said testatrix died seized having been all acquired, so far as your orators have been able to ascertain, by purchase or by descent *ex parte paterna*, and not by *descent ex parte materna*; and the law defining the heirs of a decedent for real estate making, as your orators are advised, a distinction with respect to property so acquired in favor of paternal relatives as against maternal relatives in equal degree, which distinction does not obtain in the statutes defining the next of kin for the distribution of personal property." The bill then prays that the Court may assume jurisdiction; that the will may be construed; that the estate may be distributed under its direction, and for an order of publication against any unknown heirs or next of kin of the testatrix," etc. To this bill Lewis W. Suman, a son of Caroline E. Suman, deceased, who was a first cousin of the testatrix, filed an answer and a cross-bill, in which he admits that the nearest relatives of the testatrix, living at the time of her death, were her four first cousins, Mrs. Boyd, Mrs. Watts, Mrs. Gettier and Charles F. Wells, but alleges "that of all the first cousins the" testatrix "was most attached to the said Caroline E. Suman;" that about ten years ago, when the testatrix was supposed to be at the point of death, she stated to Caroline E. Suman that she did not intend to make a will, that "the law disposed of her property in the way in which she wanted it to go, and that Mrs. Suman and her children would get their share;" that some years after Mrs. Suman's death, when the testatrix again stated that she did not intend to make a will, and that Mrs. Suman's children would take the share their mother would have taken, she was told that they would not take anything unless she made a will, and she then declared "she would make a will whereby they would get their mother's share," and that the will in question "was made for the purpose of carrying into effect the intention of the testatrix in this respect." The answer and cross-bill then make the same allega-

Md.]

Opinion of the Court.

tions contained in the bill filed by Lula W. Suman and Sophie J. Day, which we have already set out, and further allege that the testatrix "up until the time of her decease provided for Caroline E. Suman," the daughter of Caroline E. Suman, deceased, who had no means "outside of" the support so provided by the testatrix; that the ties of affection existing between the testatrix "and the said Caroline E. Suman, the elder, were of the strongest character," and that the testatrix "manifested her affection not only in providing for the said Caroline E. Suman, the younger, but also at times assisted" the said Lewis W. Suman, "who was also without any resources, and had a wife and four young children dependent upon him;" that the brother and other sister of the said Lewis W. Suman have only small incomes, and that the testatrix never knew the said Charles F. Wells, who "is a man of great wealth," and resides in Pittsburg, Pennsylvania. The prayer of the cross-bill is the same as the prayer of the bill filed by Lula W. Suman and Sophie J. Day.

The plaintiffs, executors, filed a motion to strike out the appearance entered for Lewis W. Suman, and said answer and cross-bill filed in his behalf, upon the following grounds: (1) Because, "as appears from said answer, the said Lewis W. Suman is not an heir at law or one of the next of kin of the said Rose A. Harvey, nor a beneficiary under her will." (2) "Because no leave of Court for such intervention was given." (3) "Because neither said answer nor the cross-bill filed therewith show that said Lewis W. Suman has any such interest in the subject-matter of this cause as would entitle him to intervene." The Court below granted this motion, and ordered the answer and cross-bill to be stricken from the files, and the appeal in No. 28 Appeals is from that order.

Testimony was taken under the bill filed by the executors, and the Court below decreed that Mrs. Boyd, Mrs. Watts, Mrs. Gettier and Charles F. Wells are the only heirs at law and next of kin of the testatrix, and that they are entitled to

the proceeds of sale of the personal estate, and reserved for further determination the question of their respective rights in the real estate or proceeds of sale thereof. Thereupon, upon a petition filed in the Court below, Christina Johanna Hettinger, the appellant in No. 57 Appeals, and a daughter of another deceased first cousin of the testatrix, was made a party defendant in the case in order that she might enter an appeal from said decree.

The construction of the will, so far as the questions presented by these appeals are concerned, would seem to be free of difficulty. The testatrix directs her executors to convert all her estate, consisting of real and personal property, into cash, and to distribute the proceeds thereof among "my heirs at law and next of kin, who may be entitled thereto under the laws of Maryland." The gift is to those who were, at the time of her death, her heirs at law and next of kin according to the laws of Maryland, and only those answering this description are entitled to share in the distribution of the estate. It is said in 2 *Jarman on Wills*, star page 905: "Like all other legal terms, the word *heir*, when unexplained and uncontrolled by the context, must be interpreted according to its strict technical import; in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy. It is clear, therefore, that where a testator devises real estate simply to his heir, or to his heir-at-law, or his right heirs, the devise will apply to the person or persons answering this description at his death, and who, under the statute regulating the law of inheritance will take the property in the character of devisee, and not, as formerly, by descent." In *Hoover v. Smith*, 96 Md. 393, the testator devised and bequeathed all his property, "real, personal and mixed," to his wife for life, or so long as she continued to be "his widow," and directed that after her death or marriage the property should be sold, and the proceeds "divided equally among my lawful heirs." In

Md.]

Opinion of the Court.

that case JUDGE BOYD said: "In 15 *Ency. of Law* (2nd ed.), 322, it is said: 'A devise to heirs, whether to ones own heirs or to the heirs of a third person, designates not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to be that they take as heirs would take by the rules of descent,' and again it is there said: 'It is well settled that a gift to the heirs of one will be construed as referring to those who are such at the time of the ancestor's death.' If then we adopt the ordinary meaning of the term used by the testator (lawful heirs), we find that he presumably intended that those who would be entitled to his real estate *at the time of his death* should get the benefit of the proceeds of sale. * * * So reading the will thus far, we find the testator left his property to his wife for life, or so long as she remained unmarried, and after her death or marriage to a class of persons whom he designated by the terms which the law says means those upon whom the law casts his real estate immediately upon his death." In *Dove v. Tarr*, 128 Mass. 38, cited in support of the text in 15 *Ency. of Law, supra*, the Court says: "A devise to 'heirs,' or 'heirs at law,' is always construed as referring to those who are such at the time of the testator's death unless a different intention is plainly manifested by the will." See also, *Minot v. Tappan*, 122 Mass. 536. In 2 *Jarman on Wills*, the author says, on star page 953: "A devise or bequest to *next of kin* creates a joint tenancy in the nearest blood-relations in equal degree of the propositus; such objects being determined without regard to the Statutes of Distribution," and, on star page 954: "But a reference to the statute, whether express, or implied by mention of intestacy, will admit all kin within the statutory limit. And if a testator describes the objects of gift by express reference to the statute, as next of kin under or according to the statute, and does not expressly state how they are to take, they take ac-

ording to the mode and in the shares directed by the statute." The same rule is stated in 16 *Am. and Eng. Ency. of Law* (1st ed.), 705, where it is further said: "The term 'next of kin' has reference to the death of the ancestor, and those who are entitled to take under that term are to be ascertained at the death of the ancestor." According, therefore, to the natural meaning of the terms employed, the testatrix intended her estate to go to those who, at the time of her death, were, under the Maryland laws of descent and distribution, her heirs at law and next of kin.

There is nothing in the will to indicate that the testatrix intended any other person or class of persons to share in the distribution, and the fact that she was fond of her deceased first cousin, Caroline E. Suman, and the further fact that she manifested affection for some of her children by contributing during her life to their support, are not sufficient to control the clear and unambiguous terms of her will. Nor would the declarations of the testatrix, referred to in the bill filed by Lula W. Suman and Sophie J. Day, and in the answer and cross-bill of Lewis W. Suman, be admissible in evidence to show that she intended the children of Caroline E. Suman, deceased, to take a part of her estate. In the case of *Walston v. White*, 5 Md. 297, the testator gave the appellant all his lands "lying 'on the south side of Beaver Dam Branch.' " The Court held that this language was too explicit to allow of doubt as to his intention, and that the only difficulty arose from the fact that the evidence showed that there was a difference of opinion as to the true location of the stream. In answer to the contention of the appellee that this item of the will would be gratified by giving the appellant those portions of "Parson's Outlet which lie southwardly of Beaver Dam Branch, below the forks." CHIEF JUDGE LE GRAND said: "This undoubtedly is so if those portions of Parson's Outlet be *all* the lands which the testator owned which are south of the branch; but if they

Md.]

Opinion of the Court.

are not *all*, then they would not gratify the requirement of the second item of the will. But we have no doubt about the right of the plaintiff to introduce evidence to show the true location of the lands and of the branch. The rule is this: where the language of the testator is plain and unambiguous such language must govern, and, therefore, extrinsic evidence is inadmissible to show that he *meant* something different from what his language imports; but any evidence is admissible, which, in its nature and effect, simply *explains* what the testator *has* written; in other words, the question in expounding wills is not what the testator *meant* as distinguished from what his words express; but simply what is the meaning of his words. And extrinsic evidence, in aid of the exposition of his will, must be admissible, or inadmissible with reference to its bearing upon the issue which this question raises. *Wigram's Rules of Law*, 9. So again, proposition fifth of the same author, which is, that, 'for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to *identify* the person or *thing* intended by the testator, or to determine the quantity of interest he has given by his will.' In the case of *Shreere v. Shreere*, 43 Md. 382, the Court held that the declarations of the testatrix after she made her will as to its effect, and her intentions in executing it, were clearly inadmissible to affect the construction of the will. In 1 *Redfield on Wills*, page 54, it is said: "The declarations of the testator, whether made before, contemporaneously with, or subsequent to the making of the will cannot be received to affect its construction." In the case of *Shipley v. Mercantile Trust Co.*, 102 Md. 649,

the testator gave his wife "dower and thirds" in the residue of his estate, and the declarations of the testator that he had made his will, and that his wife would take under his will one-third of everything he possessed, were offered in evidence. The Court, applying the rule stated in *Redfield on Wills, supra*, and *Shreeve v. Shreeve, supra*, held that the evidence was not admissible, and JUDGE PEARCE said: "In adhering to this rule, we have no reference to that class of cases described in *Walston v. White*, 5 Md. 305, in which it was said extrinsic evidence may be resorted to for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the physical quantity of interest intended to be given by the will.

"But it must be remembered that in no case can extrinsic evidence be resorted to in construing a will, except where upon reading the words questioned in connection with the entire will, or upon applying them to the facts in the case, there arises in the opinion of the Court, an ambiguity or difficulty of construction, and we cannot perceive that any such exists here. The words 'dower and thirds,' in themselves have each a uniform, established meaning both in law and in common usage; * * * In *Underhill and Strahan on Interpretation of Wills*, page 5, it is laid down, 'that a testator who uses words which have an intelligible, conventional meaning is not to be held to have used the words with any other meaning, unless the context of the instrument shows that he intended to do so.' " This statement of rule by JUDGE PEARCE, is in accord with Vice Chancellor Wigram's second rule of interpretation of wills, given in note 1, on page 334 of 1 *Greenleaf on Ev.* (13th ed.), which is as follows: "II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule

Md.]

Opinion of the Court.

of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." In the case of *Tucker and others, Executors, v. Seaman's Aid Society and others*, 7 Met. 188, "A testator (quoting from the syllabus) gave a legacy to 'the Seaman's Aid Society in the City of Boston;' another society, denominated 'The Seaman's Friend Society,' claimed the legacy, and offered evidence to prove that the testator had no knowledge of the existence of the society named in his will; that he knew of the existence of said other society, was deeply interested in its objects, had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener, who wrote his will, to insert the legacy as made to said society; that the scrivener not knowing the existence of said society, told the testator that the name of the society was the Seaman's Aid Society; and that the testator thereupon submitted to have that name inserted." The Court held that this evidence was not admissible, and that the Seaman's Aid Society was entitled to the legacy. SHAW, C. J., at the conclusion of a lengthy opinion, said: "The present is not a case of latent ambiguity, for the reasons clearly stated. On the face of the will it is plain and clear. When the will comes to be applied, there are found to be two societies: one rightly named and described, the other not. There is then no ambiguity as to the society intended by the will. It is the offer of proof of intent *aliunde* which creates the doubt, and this is clearly inadmissible, under the rule applicable to such cases." As we have said, in the case at bar the terms of the will are plain. The testatrix clearly designated the objects of her bounty, and there are those who answer the description. There can be no difficulty, therefore, in applying the terms of the will to the

facts in the case. Evidence to show who, at the time of her death, were her heirs at law and next of kin, under the laws of Maryland, and, in that sense, to *identify* the persons named in the will, is, of course, admissible, but extrinsic evidence cannot, under the authorities cited, be resorted to for the purpose of showing that the testatrix intended persons other than those named in her will to share in the distribution of her estate.

The appellants rely upon the allegations of the bill filed by Lula W. Suman and Sophie J. Day, and the answer and cross-bill of Lewis W. Suman, "that the testatrix fully intended and supposed she was providing by her will for the children of Caroline E. Suman," deceased, and that she was, by someone unknown to the appellants, "misled into believing that the language in said will did in fact" make such provision, as sufficient to establish a trust in favor of the children of said Caroline E. Suman. It is said in 2 *Pomeroy's Eq.*, sec. 1054 (2nd ed.): "Whenever a person procures a devise or bequest to be made directly to himself,—and thereby preventing perhaps an intended testamentary gift to another,—through false and fraudulent representations, assurances or promises that he will carry out the original and true purpose of the testator, and will apply the devise or bequest to the benefit of the third person who is the real object, and who would otherwise have been the natural recipient of the testator's bounty, and after the testator's death he refuses to comply with his former assurances or promises, but claims to hold the property in his own right and for his own exclusive benefit,—in such case equity will enforce the obligation by impressing a trust upon the property in favor of the one who has been defrauded of the testator's intended gift, and by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect," etc. In the case of *Gaither v. Gaither*, 3 Md. Ch. 158, CHANCELLOR JOHN-

Md.]

Opinion of the Court.

son stated the principles as follows: "The proposition of law upon which the complainant's case rests, and upon which he has placed it by his bill, appears to be well fortified by authority. That proposition is, that if an heir or personal representative or devisee whose interests would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances that his wishes shall be executed, as though the provision were made, such assurances will raise a trust which, though not available at law, will be enforced in equity on the ground of fraud." And in disposing of the case he said: "Upon attentively reading and considering the testimony adduced by the plaintiff, and putting out of view altogether the proof on the other side, I can see no ground upon which I could decree the relief prayed by this bill in opposition to these answers. The principle, it will be remembered, is, that the heir or devisee must have induced the testator or intestate to omit the particular provision by assurances that his wishes should be as fully executed as if the omitted provision was made, and even though it be conceded that such an engagement may be entered into not only by words but by silent assent, as in a case somewhat analogous was held by LORD LOUGHBOROUGH, in 4 Ves. 10, and was considered by LORD ELDON, sufficient to raise a trust in *Paine v. Hall*, 18 Ves. 475, still this bill cannot be maintained, because, as I read the evidence, there is no proof of any assurance by Beale Gaither, either by express or silent assent, that if the testator would not make the provision set up by the bill, he would, nevertheless, execute his intentions as though he had made it." In the case of *Needles v. Martin*, 33 Md. 609, *Gaither v. Gaither*, *supra*, is cited by the Court in support of the statement: "In this case the property was bequeathed by the testator and accepted by the legatees, upon the express understanding and agreement between them, that it should be applied in the manner and to the object prescribed in the letter of instructions, and, under such cir-

cumstances, a Court of Equity will interpose to prevent them from appropriating the property to themselves, and to compel the execution of the trust, if the trust can be legally sustained." In the case of *Clark v. Callahan*, 105 Md. 600, the father of the appellee had a benefit certificate made payable to her upon the understanding with her that she would pay one-half of the proceeds to the appellant, and JUDGE PEARCE said: "By assenting to her father's wishes and directions she led him to make no other disposition in favor of the plaintiff, and fastened upon her conscience a trust or confidence which she cannot repudiate without fraud, and which a Court of Equity will enforce." In *Coyne v. Supreme Conclave*, 106 Md. 54, JUDGE BURKE says: "There is also a class of trusts which arise *ex maleficio*, and equity in order to reach the possessor of what in conscience belongs to another, turns him into a trustee. 'Thus, if a man in confidence of the parol promise of another to perform an intended act, should omit to make certain provisions, gifts or arrangements, by will, or otherwise, such a promise would be specifically enforced in equity, etc.'" And in the case of *Whitehouse v. Bolster* (95 Maine), 50 At. Rep. 240, the Court said: "There is one principle that runs through all the cases, and which, in our view of this case, must be decisive here. It must always appear that the decedent relied upon the promise of the heir or devisee as an effective arrangement for the future disposition of his property. This principle is fundamental and universal." See also *Colegate D. Owing's Case*, 1 Bland, page 402, and note to *Crossman v. Keiser*. 8 L. R. A. (N. S.) 698. It would seem clear, without further citation of authority, that the allegations of the bill, answer and cross-bill, do not bring the cases within the principle upon which the appellants rely. It is not alleged that the testatrix gave her property to her heirs at law and next of kin relying upon their promise, or the promise of anyone of them, either express or implied, to give any part of it to the children of Caroline E. Suman, deceased. On the con-

Md.]

Opinion of the Court.

trary, the distinct allegations are that the testatrix supposed the appellants would take under the provisions of the will. In order to establish such a trust, it must appear that the devisee or legatee took under the will property which he would not have received but for his promise, express or implied, to take it for a third person. In such cases equity enforces the obligation in order to prevent the consummation of a fraud.

The remaining question is, are the appellants within the class designated by the testatrix to take her property? The evidence shows and it is conceded, that Mrs. Boyd, Mrs. Watts, Mrs. Gettier and Charles F. Wells are first cousins of the testatrix, and that the appellants are children of first cousins who died before the testatrix, and the precise question is, do such children share in the distribution as heirs at law or next of kin under the Maryland statutes of descent and distribution? Under Article 46 of the Code, where the real estate descended to the intestate on the part of the father, and there are no children or descendants; no father, brothers or sisters of the blood of the father, or descendants of such brothers or sisters, such estate goes to the grandfather on the part of the father, and section 6 provides: "If no such grandfather living, then to the descendants of such grandfather and their descendants, in equal degree, equally." Where the real estate descended to the intestate on the part of the mother, and there are no children or descendants; no mother, no brothers or sisters of the blood of the mother, or descendants of such brothers or sisters, such estate goes to the grandfather on the part of the mother, and if no such grandfather be living, then by section 14, it goes to the descendants of such grandfather, "in equal degree, equally." Where the estate is vested in the intestate by purchase, etc., and there are no children or descendants; no brothers or sisters of the whole blood, or descendants of such brothers or sisters; no brothers or sisters of the half blood, or descendants of such brothers or sisters, section 21 directs that it shall go

to the father, and if no father living, then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather in equal degree, equally." Section 27, provides: "If in the descending or collateral line, any father or mother shall be dead, the child or children of such father or mother shall by representation be considered in the same degree as the father or mother would have been if living, and shall have the same share of the estate as the father or mother, if living, would have been entitled to, and no more; and in such case, where there are more children than one, the share aforesaid shall be equally divided among such children; provided, that there be no representation admitted among collaterals after brother's and sister's children." Article 93 of the Code, after providing the order in which the personal estate of an intestate shall go to the children, descendants, father, brothers or sisters, descendants of brothers or sisters, and mother, by section 129 provides: "After children, descendants, father, mother, brothers and sisters of the deceased, and their descendants, all collateral relations in equal degree shall take, and no representation amongst such collaterals shall be allowed; and there shall be no distinction between the whole and half blood."

Since the cases of *Porter v. Askew*, 11 G. and J. 346, and *McComas v. Amos*, 29 Md. 120, and the full discussion and review of those cases in *Hoffman v. Watson*, 109 Md. 532, there can be no doubt as to the proper construction of section 27 of Article 46, and section 129 of Article 93, in regard to representation among collaterals. In *Porter v. Askew* the Court held that the proviso in the fourth section of the Act of 1820, Ch. 191 (now section 27 of Article 46 of the Code), limited representation among collaterals to the children of brothers and sisters of the intestate, and that the aunt of the intestate was entitled to the whole estate, to the exclusion of children of deceased uncles and aunts of the intestate. In *McComas v. Amos*, the Court said that under section 131

Md.]

Opinion of the Court.

(now section 129) of Article 93 of the Code, no representation is admitted among callaterals after brother's and sister's children, and that grandnephews and grandnieces are not entitled to share in the distribution of the estate "when there are those (nephews and nieces) of a nearer degree of relationship to the intestate." As the children of first cousins of the testatrix are more remotely related to her than her first cousins, and as such children cannot take by representation, it follows that if Mrs. Harvey had died intestate, they would not have been entitled to any part of her real or personal estate, and do not, therefore, come within the class described by the testatrix as, "my heirs at law and next of kin, who may be entitled thereto under the laws of Maryland." This we understand to be conceded by some of the appellants, but it is ingeniously argued on behalf of one of the appellants that Mrs. Watts, Mrs. Gettier and Charles F. Wells "do not take as first cousins of Mrs. Harvey, but as descendants of the common ancestor, i. e., Mrs. Harvey's paternal grandfather;" that they are not in the collateral line but in the descending line; that the proviso in section 27 does not apply to them, and that if said first cousins take as descendants of the paternal grandfather the appellant will also take in the same capacity. If this contention is sound then the decision in *Porter v. Askew*, *supra*, so recently approved by this Court in *Hoffman v. Watson*, *supra*, was radically wrong, for, as we have said, the Court in that case treated the aunt and first cousins of the intestate as collateral relations, and held that the proviso in section 27 applied. It is said in 2 *Blackstone*, 202: "Consanguinity, or kindred, is defined by writers on these subjects to be '*vinculum personarum ab eodem stipite descendentiem*'; the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral. Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other." * * * (page 203.) "Collateral kindred answers the

same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other." In 1 *Bouvier*, 186, Collateral kinsmen are said to be "those who descend from one and the same common ancestor, but not from one another; thus brother and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same." The term "Collaterals" in the sections of the Code referred to, means the collateral relations of the intestate, and the fatal error in this contention is that it overlooks the fact that the appellant, in order to bring herself within the provision of the will, is seeking to establish her right to inherit *from her mother's first cousin*, and not *from her mother's grandfather*.

It follows from what has been said, that the appellants have no interest in the estate of the testatrix, and that the decree of the Court below sustaining the demurrers and dismissing the bill must be affirmed.

Decree affirmed, the costs in this Court to be paid by the Executors out of the estate.

JOHN E. SEMMES ET AL., THE BOARD OF SCHOOL
COMMISSIONERS OF BALTIMORE CITY
vs. ETHEL ROWLAND.

*Board of School Commissioners of Baltimore City Not Authorized to Appoint Probationary Teacher
Subject to Dismissal.*

The Board of School Commissioners of Baltimore City has the power under Local Code, Art. 4, sec. 99, to subject a candi-

Md.]

Syllabus.

date for the position of teacher in the public schools to the test of actual work in teaching in order to ascertain his aptness to teach, as a part of the examination of such candidate. But the Board is not authorized to appoint a candidate as a probationary teacher for one year, making the appointment subject to cancellation during that year. The Board can only appoint regular teachers upon the nomination of the Superintendent of Instruction after an examination as to the fitness of the candidate.

Local Code of Baltimore City, sec. 99, provides that the Board of School Commissioners shall confirm or reject all nominations of teachers in the public schools made to it from graded lists by the Superintendent and his assistants, and that any teacher may be removed by said Board on the recommendation of the Superintendent after charges preferred and trial had. A resolution adopted by the School Board directed that no candidate should be appointed a regular teacher whose aptness to teach had not first been tested by the Superintendent during a probationary period of twelve months prior to such appointment. The petitioner in this case was appointed by the Board a teacher in the schools under the condition that her aptness to teach be made manifest by her work during twelve months, and that if, during that period, her work should be deemed unsatisfactory by the Superintendent, the appointment should be subject to cancellation, on ten days' notice. This appointment was made without a nomination to the Board by the Superintendent. Before the end of the twelve months' period, the petitioner was notified by the Board that the Superintendent had reported her work as teacher to be unsatisfactory, and that her appointment was cancelled. She then filed the petition in this case alleging that she had been removed as teacher without charges having been preferred against her and a trial had; that the Board had no power to make a conditional appointment of her as a probationary teacher, and that since the condition was void, she was a regular teacher and could be removed only in the manner prescribed by statute. *Held*, that the appointment of the petitioner was void, not only for the want of a preced-

ing nomination, but because of the condition contained in the appointment, it not being within the power of the Board to make such conditional appointment, and that since the appointment was void, the petitioner never became a teacher within the meaning of the statute, and that consequently she was not entitled to have charges preferred against her and a trial had before the Board could refuse to permit her to teach in the schools.

Decided January 10th, 1911.

Appeal from the Baltimore City Court (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, THOMAS, PATTISON and URNER, JJ.

Sylvan Hayes Lauchheimer and German H. H. Emory (with whom was *Edgar Allan Poe* on the brief), for the appellants.

David Ash and Charles Jackson, for the appellee.

PATTISON, J., delivered the opinion of the Court.

In January, 1909, Miss Ethel Rowland, the appellee, who will hereafter be referred to as the relator, received from the Secretary of the Board of School Commissioners of Baltimore, the appellants, who will hereafter be called the respondents, the following letter:

"BALTIMORE, January 13, 1909.

"To Miss Ethel Rowland:

"You are hereby notified that by action of the Board of School Commissioners of Baltimore, dated as above, you have been appointed as a teacher in the Public Schools of Baltimore

Md.]

Opinion of the Court.

"RETAIN THIS" City, to take effect upon your signing the prescribed letter of acceptance. But this appointment is upon the proviso that your aptness to teach shall be made manifest by your actual work as a teacher, to be tested by inspection by the Superintendent of Instruction from time to time during the twelve months following your election, and that if at any time during such twelve months your work or conduct as a teacher shall be deemed unsatisfactory by the Superintendent, this appointment may be cancelled by the Board on ten days' notice to you.

"This appointment is subject, also, to the provisions of the Act of the General Assembly of Maryland, known as the 'Teachers' Retirement Act,' passed at the Session of 1908.

"Yours respectfully,

"JOHN H. ROCHE,

"Secretary of the Board of School Commissioners."

With the above was enclosed a letter addressed to the respondents, to be signed and returned by the relator to them, should she accept the appointment, under the terms and conditions contained in the letter to her. She accepted the appointment and signed and returned the letter, which is as follows:

"BALTIMORE, January 15, 1909.

"To the Board of School Commissioners,

Baltimore—

"RETURN THIS" "I hereby accept the appointment as teacher in the Public Schools made by you in accordance with the terms of your letter of appointment, including compliance with the provisions of the Act of the General Assembly of Maryland, known as the 'Teachers' Retirement Act,' passed at the Session of 1908.

"ETHEL ROWLAND."

Thereafter she was assigned to teach at one of the public schools of the City, known as School No. 63, and while so

teaching she received the following letter from the Secretary of the Respondents:

"BALTIMORE, December 23, 1909.

"*Miss Ethel Rowland,*
City.

"DEAR MISS ROWLAND:

"I am instructed by the Board of School Commissioners to notify you, which I now do, that your appointment, of date January 13, 1909, is hereby cancelled, to take effect from ten days from date, as per contract signed by you under date of January 15, 1909, your work being reported as unsatisfactory by the Superintendent of Public Instruction.

"Yours very respectfully,

"JOHN H. ROCHE,

"Secretary."

After the expiration of the time mentioned in this last letter to her, the relator was not permitted, by the respondents, to teach. Whereupon, on the 18th day of January, 1910, she filed her petition in the Baltimore City Court, asking that a writ of mandamus be issued against the respondents requiring them to reinstate her as a teacher and that she be assigned by them to teach at one of the public schools of the City.

In her petition she alleges the facts above stated and further alleged that she was dismissed or removed as a teacher without charges being preferred against her and without trial thereon; that she was ready and willing to teach but was not permitted to do so by the respondents, and that in consequence thereof she has suffered and continues to suffer irreparable damages.

The respondents filed their answer in which they admit the appointment of the relator upon the terms and conditions disclosed by the correspondence above given, and likewise admit the cancellation of the appointment as stated and their refusal to permit her to teach after the time named in the cancellation notice dated December 23rd, 1909. They also

Md.]

Opinion of the Court.

admit that no opportunity was given to her to be heard upon any charge preferred against her, and allege that it was not incumbent upon them to do so; that by the terms and conditions of the appointment, to which she had agreed, they had the absolute right to cancel it when and as it was done. In the answer they allege that "James H. Van Sickle, Superintendent of Instruction, having tested the work and conduct of the petitioner as a teacher, by inspection thereof from time to time since her appointment, made the following report to the Board of School Commissioners:

"December 22, 1909.

"*To the Board of School Commissioners:*

Gentlemen—

"We have to report that Miss Ethel Rowland, now completing her year of probationary teaching, has in spite of an unusually large amount of supervisory assistance, made so little progress and shown such a lack of promise toward ever becoming a good teacher, that, in our judgment, she should not be retained in the service after the expiration of the trial year.

"Under the terms of the contract, signed by the teacher, she is entitled to ten days' notice. We respectfully suggest that if you care to follow the precedent of certain high-school cases, you might let the teacher sign a contract for a second trial year.

"JAMES H. VAN SICKLE,

"Superintendent of Instruction."

The answer further alleges that at a meeting of the respondents on the 22nd day of December, 1909, the following action, among other things, was taken:

"Ten Days' Notice:—On report of the Superintendent, it was ordered that a certain teacher now completing her year as probationary teacher, be given ten days' notice of cancellation of appointment, she being reported unsatisfactory."

The answer then alleges that the teacher referred to was the petitioner and that it was in pursuance of this order that

the cancellation notice of December 23, 1909, was sent to the relator by the Secretary of the respondents.

To the answer the relator filed her demurrer, which was sustained by the Court. The respondents, upon leave being granted them, filed their amended answer, in which after adopting the original answer in full, alleged that by section 101 of the City Code it is made the duty of the Superintendent and his assistants to ascertain the training, knowledge, *aptness for teaching* and character of every candidate for the place of teacher and to report to the respondents graded lists of those whom they deem qualified for appointment, from which graded lists all nominations for teachers shall be made by the Superintendent and his assistants to the respondents, and that by section 99 of the said Code it is provided that the respondents shall confirm or reject all nominations of teachers thus made to them by the Superintendent and his assistants. That it was found by the respondents and the Superintendent and his assistants to be impossible to ascertain the aptness of the candidate for teaching by written examinations alone, but that this could only be surely ascertained by an inspection of the actual work of such candidates as teachers. Therefore it was resolved by the School Board in April, 1907:

“That no candidate should be appointed a regular teacher in the public schools of Baltimore City whose aptness to teach had not first been tested by the Superintendent during a probationary period of twelve months prior to such appointment.” The answer then alleges that “since that time no candidate is, or has been, nominated to the School Board by the Superintendent or his assistants, for appointment as regular teacher, whose aptness to teach had not first been made manifest by actual work as a teacher during said probationary period;” that all candidates before entering upon their said probationary period are notified as the relator was in this case, the forms for notification and acceptance being the

Md.]

Opinion of the Court.

same, and that it was pursuant to this rule adopted as afore-
said that the relator was appointed probationary teacher, sub-
ject to the terms and conditions given, which terms and con-
ditions were accepted by her.

The answer further alleges that she was never recommend-
ed to the School Board by the Superintendent or his assist-
ants, for appointment as a regular teacher in the public
schools of Baltimore City and was never so appointed.

To this amended answer the relator also filed her demurrer
and this too was sustained. Whereupon the respondents de-
clined to answer, and an order was accordingly passed grant-
ing the writ of mandamus asked for by the relator. It is
from this order sustaining the demurrer to the respondents'
amended answer and granting the writ of mandamus as
prayed, that this appeal is taken.

It will thus be seen from what has been said that the re-
lator was removed from her position by reason of her al-
leged failure to meet the requirements and conditions im-
posed upon her at the time of her appointment. It is of
this removal that the relator complains, contending that she,
under the provisions of the Code, notwithstanding her con-
sent to the conditions imposed at the time of appointment,
could not have been removed as teacher without charges be-
ing preferred against her and trial had thereon; and fur-
ther contending that while the appointment was valid, the
conditions imposed were void.

Section 99 of the City Code provides: "The members of
the said Board (referring to the Board of School Commis-
sioners) shall be chosen by the Mayor from among those he
deems most capable of promoting the interest of public edu-
cation by reason of their intelligence, character, education
or business habits. * * * The said Board shall confirm or re-
ject all nominations of teachers made to it, as hereinafter
provided by the Superintendent of Public Instruction and
his assistants. It shall not confirm the appointment of any

teacher whose name does not appear upon the graded list, hereinafter provided for. All officers, secretaries, clerks and employees shall be appointed by said Board, and may be removed by it at pleasure, and any teacher may be removed by said Board on the recommendation of the Superintendent of Public Instruction after charges preferred and trial had."

Section 101 provides: "It shall be the duty of the Superintendent of Public Instruction and his Assistants, as examiners, to ascertain, by appropriate committees, appointed as hereinbefore provided, the training, knowledge, *aptness for teaching* and character of every future candidate for the place of a teacher, and to report to the Board of School Commissioners graded lists of those whom they deem qualified for appointment, from which graded lists all nominations of teachers shall be made by the Superintendent of Public Instruction and his Assistants to the Board of School Commissioners. All such nominations of teachers shall be made in the order in which the names of the nominees appear upon such graded lists. In the preparation of these graded lists the superintendent of Public Instruction and his Assistants shall ascertain by competitive examination the relative qualifications of those candidates who desire appointment, and shall place the names of the accepted candidates upon said graded lists in the order of their relative qualifications, so ascertained by such competitive examination."

It will be seen from the above provisions of the City Code, that there are two requirements that must be observed before a person can, by appointment, become a teacher in the public schools of Baltimore City. There must, first, be a nomination by the Superintendent of Public Instruction and his Assistants to the Board of School Commissioners made in conformity with the requirements of the provisions of the City Code; and, second, a confirmation by the Board of School Commissioners of the nomination so made to them by the Superintendent and his Assistants, followed by an ap-

Md.]

Opinion of the Court.

pointment of the nominee. The teacher, when so appointed, holds for no fixed or definite period of time, but is subject to removal by the Board of School Commissioners upon the recommendation of the Superintendent of Public Instruction after charges preferred and trial had.

The relator does not allege in her petition that she was nominated by the Superintendent of Public Instruction and his Assistants to the Board of School Commissioners, and that she, upon such nomination, was by the Board of School Commissioners appointed a teacher in the public schools of Baltimore City, but contents herself by alleging simply that "having been elected by the said defendants (the School Commissioners) as a public school teacher" she qualified as such and was assigned to teach at one of the public schools of the City.

The respondents, in their answer, meet this allegation by alleging "that the petitioner never was recommended to the School Board by the Superintendent of Public Instruction and his Assistants for appointment as a regular teacher in the public schools of Baltimore City, and never was appointed as a regular teacher" in the City schools. In explanation of what is meant by the term "*regular teacher*," the respondents, in their answer, allege that they, the respondents, and the Superintendent and his Assistants "found through experience that it was impossible for the said Superintendent to ascertain the *aptness for teaching* of candidates for the place of teacher by written examinations alone, but this could only be truly and surely ascertained by an inspection, during some probationary period of actual work of such candidates as teachers." Accordingly, the resolution of April, 1907, hereinbefore given in full, was passed, and thereafter no candidates were appointed as regular teacher in the schools of the City whose aptness to teach had not first been tested by the Superintendent during a probationary period of twelve months prior to such appointment. This test became a fixed, permanent test, which was applied to all can-

didates and to which all candidates were required to conform, before any one of them could be nominated by the Superintendent to the School Board for appointment as regular teacher.

From this explanation it appears that the term "*regular teacher*" is used in contradistinction to that of "*probationary teacher*," which latter class of teachers, it seems, is but an outgrowth of the method or practice adopted by the respondents and the Superintendent of Public Instruction and his Assistants for the purpose, as they allege, of ascertaining the *aptness for teaching* of the candidate seeking appointment. Therefore, the allegation in the answer that the relator was never nominated by the Superintendent of Public Instruction to the Board of School Commissioners, has application to the former class of teachers, and as this allegation is admitted by the demurrer to be true, it will be so considered by us. If, therefore, the power of the School Board is confined to the appointment of what is known by them as "*regular teachers*," then the answer is sufficient and complete and the demurrer thereto was improperly sustained by the learned Court below.

It thus becomes necessary for us to inquire as to the validity of the appointment of the relator as a probationary teacher under the terms and conditions imposed upon her in the correspondence hereinbefore fully set out. We recognize and appreciate the force of what is said by the respondents in relation to the necessity of subjecting the candidates to a test of actual teaching before they can pass upon and determine such candidate's aptness for teaching. It would, indeed, be difficult, if not impossible, by a written examination alone, to determine whether or not the candidate possessed this important qualification. It would seem absolutely necessary that the candidate should be subjected to the test of actual work as a teacher in order to determine fully whether or not such candidate has this qualification. As the provisions of the Code require that this qualification, as well as others, shall be ascertained before the nomination is made, we think it permissible, under the Code, to subject the candi-

Md.]

Opinion of the Court.

date to such test as part of the examination that the candidate is required to undergo, but we do not think it necessary that an appointment such as was made in this case should be made in order to subject the candidate to such test.

In the letter to her the relator was informed of her appointment in these words: "You have been appointed a teacher in the public schools of Baltimore City, to take effect upon your signing the prescribed letter of acceptance," which letter of acceptance was signed and forwarded to the School Commissioners. This appointment, made without nomination, took effect upon her signing the letter of acceptance and was to continue in full force and effect for an indefinite period (subject to removal as provided by the Code), should her work and conduct as a teacher in the twelve months following be deemed satisfactory to the Superintendent, and should she manifest an aptness for teaching within that time. It was not necessary, by the terms of her employment, that she, at the expiration of the probationary period, if she manifested an aptness for teaching and proved satisfactory to the Superintendent, should be again appointed, but she would thereafter continue to teach as a teacher in the schools of the City under the original appointment, and therefore by such appointment she would become a regular teacher in the public schools of the City without being first nominated and appointed in the manner prescribed by the Code.

The Superintendent of Instruction, in his report upon the work and teaching of the relator, made by letter of December 22nd, says: "We respectfully suggest that if you care to follow the precedent of certain high-school cases, you might let the teacher sign a contract for a second trial year." Thus indicating the extent to which this method of appointing teachers could be and had been carried, without the right on their part of having charges preferred against them and an opportunity to be heard upon such charges before removal. Any method of appointing teachers that would admit of such extensions by which the teacher would be deprived of the

above mentioned rights, given to him or her under the Code, would not only be an evasion of the law, but would also be in violation of both the spirit and meaning of the statute.

It is contended by the relator that the conditions contained in the appointment are void, because of the alleged want of power in the Commissioners, under the Code, to make a conditional appointment and that their power to appoint is limited to unconditional appointments. They contend that with the conditions void, the appointment then stands as an unconditional appointment within the meaning of the statute. If this be true, the appointment is then void as an unconditional appointment, because there was no nomination first made, as required by the Code. The Commissioners in the exercise of the power of appointing teachers, so conferred upon them by the statute, are required to comply with its substantial provisions, otherwise the appointment is void. "The power and duty of selecting and appointing a school teacher are usually regulated by statute, and in order that the selection or appointment may be valid, there must be a compliance with all the substantial requirements of the statute relative to the mode of making such selections or appointments, and if the provision is mandatory it must be strictly pursued." 35 *Cyc.* 1074.

We cannot adopt the contention of the relator that the appointment is valid and the conditions void. In our opinion the appointment of the relator was void, not only for the want of a preceding nomination, but because of the conditions contained in the appointment, it not being within the power of the School Commissioners, under the existing provisions of the Code, to make such conditional appointment; and the appointment being void, the relator never became a teacher in the public schools of the City within the meaning of the City Code. Consequently, the School Commissioners were not required to prefer charges against her and give her an opportunity to be heard thereon before refusing to permit her to teach longer in the public schools of the City.

Md.]

Syllabus

From what we have said it follows that the lower Court erred in sustaining the demurrer to the respondents' answer and granting the writ of mandamus. We will therefore reverse the order of the Court and dismiss the petition.

*Order reversed and petition dismissed,
with costs to the appellants.*

MATILDA DETTERING vs. MICHAEL S. LEVY ET AL.

*Injury to Operative in Factory from Revolving Shaft—Duty
of Employer to Cover Dangerous Machinery When
Practicable—Evidence—Assumption of
Risk—Contributory Negligence.*

In an action to recover damages for an injury caused to an employee in a factory by uncovered and rapidly revolving shafting, evidence is admissible to show that it was practicable to cover the shafting, and as to what the general custom as to such covering is.

In such action, evidence is admissible to show whether the force and effect of a rapidly revolving shaft are generally known to untrained persons, in connection with the questions of assumed risk and contributory negligence.

When women employees in doing their work are brought in proximity to a rapidly revolving shaft so that their clothing or hair may be caught by it if they happen to approach a few inches closer than their work ordinarily requires, it is the duty of the employer to cover or protect the shafting if such covering is practicable.

The rule that an employee assumes the risk of danger in his employment should be limited to risks which are obvious and which can be understood by an employee of ordinary intelligence, or at most to those which should be anticipated

Md.]

Syllabus.

by the employee as the result of conditions which are obvious, or can reasonably be expected to be known by him.

Plaintiff was one of thirty-four women operating sewing machines at a long table in a straw-hat factory. Underneath the centre of the table, about eight inches from the floor and about twenty-three inches from the edge of the table, there was a rapidly revolving shaft which was uncovered between the pulleys on it, the distance between the pulleys being forty inches. Plaintiff got down on her hands and knees to look under the treadle for a tool, when her hair was caught on the shaft and her scalp was torn off. At different times before that, the skirts of the operators sitting at the table and using the treadles, had occasionally been caught in the shaft and torn off. There was no evidence to show that it would have been impracticable to cover the shafting between the pulleys. *Held*, that under these circumstances, the failure to protect the shafting is sufficient evidence of negligence on the part of the employer to be submitted to the jury.

Held, further, that since the plaintiff testified that she knew that it was dangerous to touch the shafting, but did not know that it would draw her hair when it was ten inches distant therefrom, the plaintiff did not assume the risk of the danger which caused the injury.

Held, further, that although the plaintiff could have borrowed the tool she was looking for at the time of the accident from another operative, or could have run a stick under the treadle to find it, she was not guilty of contributory negligence because she did not adopt one of these plans, but got down and looked under the table.

Decided January 10th, 1911.

Appeal from the Baltimore City Court (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Joseph N. Ulman and Clarence A. Tucker (with whom were S. J. Harman and Chas. H. Knapp on the brief), for the appellant.

Vernon Cook and Charles Markell (with whom were Gans & Haman on the brief), for the appellees.

BOYD, C. J., delivered the opinion of the Court.

The appellees conduct a factory in the City of Baltimore for the purpose of manufacturing straw hats, and the appellant was employed by them, and had been for fourteen years prior to the accident complained of, as a sewing machine operator. In the room in which she worked there were eight rows of tables which were fifty feet long, forty-six inches wide, and two feet, six inches high. There are on each table thirty-four sewing machines which are located on the two sides of the table, forty inches apart, and almost directly opposite each other. They are driven by power supplied by shafting from below, which is one and three-sixteenth inches in diameter and revolves at the rate of four hundred and fifty revolutions per minute. It runs the length of the table, directly in the centre, eight inches from the floor. There are on the shaft pulleys or collections of wheels consisting of a disc wheel twelve inches in diameter, clamped permanently to the shaft and revolving with it, a leather friction wheel five inches in diameter, which runs against the disc wheel when the sewing machine is in operation, and back of the leather friction wheel there is a grooved wheel seven inches in diameter which has six spokes and carries a one-quarter inch leather belt, which connects with the sewing machine on the table. There is a treadle which the operator presses on to start her machine, thereby bringing the leather friction wheel in contact with the disc wheel. When the machine is not in use the leather belt is not in motion but the pulley or disc wheel on the main shaft is always in motion when the shaft is.

Md.]

Opinion of the Court.

The treadle is 12 or 14 inches long. Each operator has at her place a needle wrench, which is used for changing the machine needle when the character of the work to be done is changed, and also a screw driver, an oil can and a measure, which are kept in the machine drawer each one has. On November 12th, 1908, the appellant wanted to change to coarse work and had to change her needle. She could not find her needle wrench and got down on the floor to look for it, and not finding it, got up again and looked in her machine drawer. She then got down again—was on her hands and knees and was looking under the treadle. The front edge of the treadle is directly under the front edge of the table. As she looked for the needle wrench her hair caught on the shaft and her entire scalp was torn off.

The testimony tends to show that her hair caught on the smooth shafting about eighteen inches from the pulleys connecting it with her machine and twenty-two inches from the pulleys connecting the shaft with the machine on the opposite side of the table. The shafting was not covered or in any way protected between the two pulleys, a distance of forty inches.

During the trial ten exceptions were taken to rulings on the evidence, and the eleventh was to the ruling of the Court in granting the defendants' second prayer offered at the conclusion of the plaintiff's testimony. The defendants offered a prayer asking the Court to instruct the jury that from the uncontradicted evidence the plaintiff by her own negligence directly contributed to the happening of the injuries and therefore their verdict must be for the defendants, and a second prayer that the plaintiff had offered no evidence legally sufficient to show any neglect on the part of the defendants as to any duty owing by them to the plaintiff, which in any way contributed to the happening of the injuries, and therefore their verdict must be in favor of the defendants. The Court granted the second prayer, but did not act upon the first, and a verdict was accordingly rendered for the defend-

ants, on which a judgment was entered, and this appeal was taken.

We will first consider the eleventh exception and in that connection will refer to some of the others, which have relation to it. We are not prepared to say that there was no evidence legally sufficient to show any neglect on the part of the defendants as to any duty owing by them to the plaintiff which in any way contributed to the happening of the injuries for which this suit was brought. The plaintiff was one of a large number of women and girls who were employed in that factory as sewing machine operators, and there were thirty-four women and girls at the table where the plaintiff was, under which the uncovered shafting was rapidly revolving. As it was less than twenty-three inches from the edge of the table and only eight inches from the floor, it must have been near the skirts of the operatives when sitting in the position necessary to use the treadles—at least sufficiently near to make it dangerous if the skirt of one of them was moved eight or ten inches toward the shaft. The testimony shows that the skirts of some of them had at different times been caught and torn off, and at least one of the operatives was seriously injured—in the language of the plaintiff “it made a wreck out of her.” Perhaps there was but little danger, if any, if the operatives always remained in the position they usually occupied, but even then a current of air might carry a skirt made of light fabric the short distance necessary to reach the shaft, a fright or some sudden movement might cause an operative to unconsciously throw her feet forward a few inches, not to speak of the fact that a fatigued girl or one with her mind on her work might thoughtlessly stretch her weary limbs beyond the safety point and her skirt be caught. Or if it be true as the evidence shows, that the small tools used by the girls were constantly being jarred off the table from the motion of the machinery, the operatives were liable to get into positions attended with

Md.]

Opinion of the Court.

danger from a rapidly revolving shaft situated as this was. It will not do to say that if all of them always used due care there was no danger when engaged at their work, for, even if that be conceded, we know by experience and observation that there is no human being who always and under all conditions will do what they would ordinarily do if they remembered they were near dangerous places or articles.

It would therefore seem that when an employer, who is under legal obligation to furnish his employees with a reasonably safe place to work in, prepares such place for women and girls, all of whom cannot be experienced, he ought to provide against such dangers as we have spoken of, if it can be reasonably done, and he has reason to believe that they do actually exist. In this instance the defendants were not only presumed to know what might happen, but they knew before the plaintiff was injured that a number of times there were accidents by reason of this unprotected shafting. There is nothing in the testimony to show that it would be impracticable to cover the shafting between the pulleys, and there is nothing to show that it is not customary to protect it when situated as this is. In the absence of some good reason for not covering it, it does not seem to be so unreasonable or so unnecessary for the protection of the operatives to require it, as to authorize the Court to declare, as a matter of law, that the defendants were not negligent in failing to do so. Ordinary men can at least differ as to that. A rapidly revolving shaft is undoubtedly likely to do injury if one comes in contact with it, and whether the location of such a shaft, when unguarded is dangerous may depend on a variety of circumstances. The most important inquiry in determining that question is: are the operatives while in the discharge of their duties likely to come in such close contact with it as to produce injury? It was not pretended in *Gleason v. Suskin*, 110 Md. 137, that it was not negligence on the part of the defendants to leave the piece of the shaft which caused that

injury, unprotected—on the contrary recovery was denied the plaintiff in that case on the ground that she was guilty of contributory negligence, which presupposes negligence on the part of the defendant.

In the only other case of a suit for damages sustained by reason of injuries caused by uncovered revolving shafting in this State, *American Tobacco Co. v. Strickling*, 88 Md. 500, we said: "Of course, it would not be necessary under all circumstances to cover shafting. It may be so situated as to be safe and at least beyond the reach of inexperienced persons, but when shafting is so easily protected, as described by some of the witnesses, and when it is so situated that those inexperienced with its danger may be brought in contact with it in the discharge of their duties, there can be no reason why in a case of this kind the question whether the owner of the factory was guilty of the want of ordinary care, and whether it was an accident likely to occur, should not be submitted to the jury." It is true that in that case the plaintiff was a girl seventeen years of age, who was inexperienced in machinery and had never been warned of the danger, but in this case the plaintiff testified that she had never been warned of such danger as she encountered, and that she did not know that there was such danger. We will refer to that branch of the case more particularly under another head, but there is certainly testimony tending to show that there was danger from this shaft, located as it was, and such as one even of the plaintiff's experience might not be aware.

As shown by the fourth and sixth bills of exception the plaintiff attempted to prove that it was practicable to cover the shafting and what the general custom was, but the Court refused to permit the questions to be answered. In our judgment there was error in both of those rulings, but there was enough in the record even without that testimony to prevent the Court from taking the question from the jury. Why shafting eight inches from the floor, having a smooth surface

for forty inches between the sets of pulleys, could not easily and readily be covered is not shown, and it is difficult to assign any reason other than the expense why it was not. If there was, then it should be given. One of the defendants, who was called as a witness for the plaintiff, volunteered the statement that the pulleys could not be boxed in, but he did not say or suggest that the shafting could not be covered. Yet one of the experts said the most dangerous part of the machinery was on the shaft, by reason of the opposing forces from the two pulleys concentrating their action toward it at about midway between the two pulleys.

In *Gleason v. Suskin*, *supra*, sewing machines were run as they were at the Levy factory—there was a shafting under the centre of the table, eight inches from the floor, of about the diameter of that in this case. It was there shown that: “This shafting was boxed for the safety of the employes in order to prevent their skirts and clothing from catching in it.” The part of it which caused the injury to that plaintiff had been uncovered for the purpose of making an extension to connect with another machine. While we cannot use the evidence in that case to show negligence on the part of these defendants, it does show that we are at least not dealing with impossibilities when we say that such a question should be submitted to the jury.

We do not mean to say that it is always negligence *per se* to leave shafting uncovered, but we do say that it was under all the circumstances of this case a question for the jury. Of the cases cited by the appellees those chiefly relied on are *Nelson-Bethel Clothing Co. v. Pitts.*, ——— Ky.———, S. C. 114 S. W. 331, and *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260, S. C. 74 N. E. 332. In the former the shafting was arranged very much as it was in this instance, but no such question seems to have been raised as we have here—whether there was negligence in not covering the shaft. There the belt which was used to operate the ma-

Md.]

Opinion of the Court.

chine was alleged to be defective. The plaintiff recovered a verdict in the lower Court, and as stated in the opinion: "The ground upon which the recovery was had was that the belt of the machine was not reasonably safe for use; that its defective and unsafe condition was known to the defendant, and unknown to her; and that she was assured that the belt was reasonably safe, and suitable for use, and used it not realizing that its condition was dangerous, relying upon the statements of Begley, the dangerous condition of the belt not being so manifest that a person of ordinary prudence would not have used it." Begley was the person whose duty it was, as claimed by the plaintiff, to fix the belts. The Court pointed out the fact that she knew as much about belts as Begley did, that she had often put them on, and had put the one in question on seven times the morning she was hurt, and added: "She understood that it was a part of her duty, and that she was hurt in putting it on was an accident which none of the parties anticipated, or had any reason to anticipate." The opinion concluded by saying that "Under all the evidence, the Court should have instructed the jury peremptorily to find for the defendant," but there is no reference to any negligence by reason of the shaft not being covered and, as we have seen, the plaintiff's theory was that the defective belt was the cause of the injury. There was some evidence that the plaintiff's hair was not put up and that the forelady had called her attention to her hair being down and directed her to tie it up, which she had agreed to do, but had not in fact done it, and that that was the cause of her hair being caught. She claimed that her hair was caught in one of the hooks on the belt, but without further discussing that case, it is sufficient to say that apparently the question we are now considering was not presented or passed on by that Court.

In the *Daniels case* the plaintiff wore a braid which came down to the middle of her back. The Court said: "The acci-

dent in this case evidently was caused by the plaintiff rising up from a stooping position in too close proximity to the twister, by so doing her hair was caught." The "twister" was one of the machines in use. The contention was that the plaintiff should have been warned of the danger of wearing her hair down, but the Court said there were two answers to that—in the first place the defendant had posted notices in different parts of the room in which the plaintiff worked warning the employees against wearing loose sacks, loose or flowing sleeves, "or wearing their hair flowing or in hanging braids or in long curls," and the plaintiff admitted that she had read part of the notice. The Court held that posting the notices was all that was required of the employer and he was not required to call the attention of each operative to the notices. Then it was said that there was no reason for instructing the plaintiff in regard to the danger of getting her clothes or hair against the machines or rollers, if she knew the danger, which she did. It was not shown in either of those cases that the shafting or machines could reasonably be required to be covered, and there was no point made as to the negligence of the defendants in not doing so.

Of course it is not necessary in all cases to cover shafting, and oftentimes it could not reasonably be required, but where, as in this case, it apparently can be readily done, and experience with the particular shafting had shown that it was dangerous if left uncovered we are not willing to announce as the law of this State that an employer does not owe his employes the duty of covering shafting so situated, where girls and women are, in the performance of their work, necessarily brought in such close proximity to it that they may be injured, if they happen to get a few inches closer to it than their work ordinarily requires. There may be cases where it would be unreasonable to require it or where no danger can be reasonably anticipated from it being left exposed, but to expect women and girls to give proper atten-

Md.]

Opinion of the Court.

tion to their work and at the same time have their minds constantly on the shafting which is so near their feet that any unusual movement by them of a few inches may result in their skirts being caught and themselves being injured is, to say the least, demanding more care and prudence of such operatives than can ordinarily be expected. It is true that the shafting is in one sense protected by the table, but it is equally true that the mere fact that it is out of sight and to some extent must be out of mind of the operative who has her thoughts on her work, increases the danger, and if it is practicable to cover the greater part of the space between the pulleys it is not unreasonable to so require of the employer, one of whose important duties is to provide his employes with a reasonably safe place to work in.

In this connection we will consider the question of assumed risk relied on by the appellees. As was said in *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, which this Court has several times quoted with approval: "It is the master who is to provide the place and the tools and machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and machinery than such as is obvious and necessary." In *Wood v. Heiges*, 83 Md. 268, after speaking of the risk which the servant assumes, when he enters the employ of a master, it is said: "Where, however, the risks to which the servant is subjected are such as he had no reason to believe, from the nature of his employment, he would have to encounter, and such risk arise from causes hidden or secret, or such as would reasonably escape his observation, the master is bound to notify his servant, provided he himself knew or by the exercise of ordinary care ought to have known of them." Again, it was said in *Eckhardt v. Lazaretto Co.*, 90 Md. 188, that "When the occupation carried on is in its nature so extra-hazardous as to be dangerous to human life or health, both justice and humanity require that the employer should take

all reasonable and needed precautions to secure safety to the employes, and make clearly known to them the inherent dangers of the service, and should especially acquaint them with such risks as are ascertainable only through a knowledge of scientific facts, which an uneducated man is not presumed to know."

In *Yates v. McCullough Iron Co.*, 69 Md. 370, this Court, after speaking of the risks which the servant assumes, said: "It may be assumed that this rule applies only to patent or obvious defects, such as persons of ordinary care would be likely to discover, and that the servant is not bound to inspect the appliances to see whether or not there are *latent* defects that render their use more than ordinarily dangerous, but is only required to ascertain such defects or hazards as are obvious to the senses, 2 *Wood's Master and Servant* (2nd Ed.), sec. 376. Hence in cases where knowledge of the defects does not necessarily carry with it knowledge of the resulting danger, it may be proper for the Court to instruct the jury as requested in the plaintiff's second prayer." That prayer asked the Court to instruct the jury that if they found that the machinery in question was, owing to some defect in it or in the building in which it was placed, unsafe and dangerous, by reason of the negligence of the defendant, "Then in order to establish that the plaintiff assumed the risks involved in using it, it is not sufficient to show that the machinery was defective, and that such defect was known to the plaintiff, but it *must appear* that the *danger* was known to him as well as the defect which caused the danger, or that by reasonable care on his part it would have been known to him."

Now without quoting further from other cases, let us apply the doctrine to be found in these decisions to the facts in this case. It may be admitted that owing to the age and experience of the plaintiff she would be held to assume such risks as were the result of coming in contact with the shaft-

Md.]

Opinion of the Court.

ing, if she had been injured by her clothing being caught in the shafting while she was engaged in her work, or if she had touched it with her head or hair, or had gotten so close to it that she would be presumed to know it would attract her hair and injure her, but she denied positively that she had knowledge of such powers of attraction as was proven in this case to exist, if the plaintiff's testimony is correct. She said: "I knew it was dangerous to touch it but I did not think for a minute that it was dangerous when you were away from it, that it would get you like it got me." She was also asked: "How close did you think you could come to it with safety," and replied: "I never considered that at all." According to her testimony she did not place her head closer to the shaft than something like ten inches. It cannot be said to be a matter of common knowledge that shafting such as this could attract human hair, or other light substance, such a distance as was testified to by the experts in this case. Indeed it would likely be questioned by those presumably much better informed on such subjects than the plaintiff, in the absence at least of testimony of those of scientific knowledge equal to that of the experts who testified. But the experts were positive as to the effects of the forces spoken of, and the plaintiff was equally positive as to the distance she was from the shaft. Assuming their testimony to be true, as we must as the case is presented, can it be possible that the law has so little regard for the thousands and tens of thousands of employes whose lives, limbs and health are in a large measure dependent upon the proper discharge of the duties which their employers owe them, as to declare that although the master is negligent the servant cannot hold him responsible for injury sustained by reason of that negligence, because the servant has assumed risks which he never dreamed existed? A servant may know his master is sick and may attend him believing he has chicken-pox. If in point of fact he has small-pox, and the master knew he had, does the servant assume all risks from small-pox because he knew the

master was sick? A servant may enter the service of a master in some excavation which he knew was dangerous by reason of obvious conditions, but does he assume the risk of being blown up by dynamite which the master knows had been left in the place to be excavated, although the servant did not know it or have any reason to suspect it? And in this case the servant knew that the unprotected shaft was dangerous if she touched it, but she did not know, according to her testimony, that the pulleys and shafting had the power of attracting hair and other light substances ten or more inches. It is possible that the defendants did not know the extent to which the powers spoken of might be exerted, but if they did not they should at least be required to explain that they did not and why they did not. They had the shafting put in position, and they ought either to know all dangers which could reasonably be anticipated as the result of it being left unprotected, or give some satisfactory reason for not knowing them. But if they did not know or could not be expected to have known that there was danger of such injury being done as the plaintiff suffered, surely she cannot be said to have assumed such risk, for there is nothing to suggest that she knew more than they did. The doctrine of assumed risk, while well established in this State, is one that ought not be extended so far as to relieve an employer of his negligence on the theory that because the employee knew there was danger, if she came in contact with a part of the machinery which made it so, she assumed all risks from it, even if she kept away from it a distance which she supposed and had the right to suppose, in the absence of some warning, was perfectly safe. The doctrine is sought to be applied so as to excuse negligence in this case, for if there was no negligence on the part of the appellees there is no occasion to rely on the doctrine of assumed risk, and hence we say that it should be limited to risks which are obvious, and can be understood by an employee of ordinary intelligence, or at most to those which should be anticipated

Md.]

Opinion of the Court.

by the employee, as the result of conditions which are obvious, or can reasonably be expected to be known by him.

Nor do we think the evidence shows such contributory negligence on the part of the appellant as to justify us in saying, as a matter of law, that she cannot for that reason recover. It may be true, as suggested by the appellees, that she actually touched the shafting, but that is not what she swore to, and according to her expert testimony her hair might have been drawn to the shafting, even if it were farther from it than she says it was. It may be that she could have borrowed a needle wrench from another operative, or could have run a stick under the treadle, to see if the wrench was there, but if she had no reason to fear any danger, from doing what she did, it cannot be said that she was guilty of contributory negligence because she did not adopt one of those plans. She needed the wrench in her work, and according to her testimony was responsible to the appellees for it if she lost it.

This case differs materially from that of *Gleason v. Suskin*, *supra*. That appellant was perfectly aware of the danger of the shafting, and of coming in contact with it, which she evidently did, but she took a position in a narrow space about thirty-five by sixteen and one-half inches, turned her back towards the shafting and without any reason placed herself very near it, although she knew it to be dangerous if her dress came in contact with it. The expert testimony showed that her dress must have been as near as one-half inch to the shafting, otherwise the accident could not have occurred, according to those witnesses, unless her dress was frayed, of which there was no evidence. The testimony failed to show that it was either necessary or even more convenient for her to take the position she did. Under those circumstances it was a clear case of contributory negligence, but here according to the evidence the conditions were altogether different.

We are of the opinion therefore that the case presented by the record was one which should have been submitted to the jury by appropriate instructions as to the negligence of the defendants (whether or not leaving the shafting unguarded was negligence), as to the assumed risks of the plaintiff and as to her contributory negligence.

We find no reversible error in the first and second exceptions as such questions could have done no possible harm. There was no error in the ruling in the third bill of exceptions. In answer to the question as to what extent the pulleys were boxed the witness said they were not boxed in, "you could not box them in." That was a very natural answer, if such was the fact, and the plaintiff had no cause to complain of it. We have already said that there was error in refusing to allow the questions in the fourth and sixth bills of exception to be answered. There was no error in striking out the testimony objected to in the fifth. The witness was not familiar with factories such as that of the appellees in Baltimore, but the question was limited to those in that city. We think the questions in the seventh, eighth, ninth and tenth bills of exception were admissible. It was proper to prove whether the forces and effects spoken of by the experts were of a character generally known to untrained persons, as reflecting upon the questions of assumed risk and contributory negligence.

For errors in granting the second prayer of the defendants, and in the rulings in the fourth, sixth, seventh, eighth, ninth and tenth bills of exception, the judgment must be reversed.

Judgment reversed, and new trial awarded, the appellees to pay the costs above and below.

Md.]

Syllabus.

LILLIAN F. GERKE ET AL. vs. COLONIAL TRUST
COMPANY, ADMINISTRATOR. ET AL.

*Construction of a Will—Absolute Gift Afterwards Declared to
be Held in Trust—Rule Against Perpetuities.*

A testator, after the termination of a life estate therein given to his wife, gave one-fourth of his estate to each of his three daughters, and the other one-fourth part to two named grandchildren. He then provided that a certain store should not be sold until after the death of his last surviving daughter, and until his youngest grandchild should become of age; that then it should be sold and the proceeds divided equally among his grandchildren. By a subsequent clause of the will, he provided that the legal title to all of the property bequeathed should be held by two trustees for the remaindermen. *Held*, that the gift of one-fourth of the estate to the two grandchildren is to be construed in connection with the subsequent clause of the will, by which the testator declared his will and wish that all the property should be held in trust, and that therefore, this one-fourth part is to be held in trust until the time appointed for sale and distribution.

Held, further, that the provision directing that the store should not be sold until after the death of the last surviving daughter of the testator and the coming of age of his youngest grandchild is valid, and not repugnant to the nature of the estate previously given to the testator's named grandchildren.

Held, further, that this provision does not violate the Rule against Perpetuities, since the grandchildren must be born within a life in being at the death of the testator.

Decided January 10th, 1911.

Appeal from the Circuit Court of Baltimore City (NILES, J.).

The cause was argued before **BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and PATTISON, JJ.**

Edward M. Hammond (with whom were *Roger T. Gill* and *Albert S. Gill* on the brief), for **F. B. Gerke**, appellant.

Chas. J. Wiener, for **L. F. Gerke et al.**, appellant.

Thomas Mackenzie (with whom was *H. Findlay French* on the brief), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

The bill in this case, is filed to obtain a construction of the last will and testament of **Charles Gerke** late of **Baltimore City**, who died on the 28th day of **March, 1891**, in so far as the rights of the grandson, **Charles G. C. Ross**, are involved.

The will bears date the 21st day of **January, 1891**, and was executed in proper form to pass personal and real estate, in this State.

The testator left surviving him, a wife, **Elizabeth Virginia Gerke**, who departed this life on the 28th day of **May, 1907**; three daughters, **Florence B., Esther T. and Lillian F. Gerke**; one son, **Walter D. Gerke**, and two grandchildren, **Charles G. C. Ross** and **Mary L. Ross**, children of a deceased daughter, **Eugenie L. Ross**. **Charles G. C. Ross** the grandson died on the 26th of **January, 1909**, leaving a widow, **Mary**, and two infant children, **Charles C. G. Ross** and **Elizabeth C. G. Ross**.

By his will, **Mr. Gerke**, first directed the payment of his debts, and then gave his household effects to his wife absolutely. Then, the will continued as follows:

Item. I give, devise and bequeath unto my said wife all the rest and residue of my estate (my real, personal and mixed property) for and during the term of her natural life.

Md.]

Opinion of the Court.

Item. After the death of my said wife, from the said rest and residue of my estate, I give and bequeath unto my son, Walter Duncan Gerke, the interest or income of six thousand dollars, at five per centum per annum, being three hundred dollars per year or twenty-five dollars per month, to be paid into his own hands and not to or into the hands of another, during the term of his natural life, the said principal sum of six thousand dollars, it is my will at his death shall go to and become the property of the issue of his body living at the time of his death; share and share alike, *per stirpes*; but if he should die without issue living at the time of his death then the six thousand dollars to go to and become the property of the issue of my body living at the time of his death, share and share alike, *per stirpes*.

Item. I give, devise and bequeath one-fourth part of the balance of the said rest and residue of my estate, real, personal and mixed unto each of my three daughters, Florence B. Gerke, Lillian F. Gerke and Esther T. Gerke, for and during the term of her natural life, and from and after her death, then unto and to the issue of her body living at the time of her death, share and share alike, *per stirpes*. If, however, she shall die (*i. e.*, any one or more of them), without issue of her body living at the time of her death, then unto and to the issue of my body then living share and share alike, *per stirpes*, my said son Walter D. excepted.

Item. I give and bequeath the other fourth part of the said balance of the said rest and residue of my estate, unto my two grandchildren, Charles G. C. Ross and Mary L. Ross, children of my deceased daughter, Eugene L. Ross.

Item. It is my wish and will that my store-house property on the southwest corner of Lexington street and Crooked lane, known as No. 5 West Lexington street, shall not be sold until after the death of my last surviving daughter and my youngest grandchild shall become of age. Then it shall be sold, the ground rent thereon be paid off and the balance be equally divided among my grandchildren then living and

the issue then living, of any deceased grandchild, share and share alike, *per stirpes*. Nor shall the said store-house property be mortgaged except for the purpose of rebuilding the same, and it is further my will that my children shall have in the meantime no right or authority to dispose of their interest in the said store property. And should it become necessary to mortgage the property no more than seven or eight thousand dollars shall be borrowed thereon and I recommend that the mortgage be taken for seven or ten years, in which event it is further my will that from the rents of said property there shall be retained such proportion of the rent as will be sufficient to liquidate said mortgage debt when the same shall become due and payable, after having first however, provided thereout, for the payment of the current expenses upon said property.

Item. I will here take occasion to say, it is my will and wish, notwithstanding anything hereinbefore contained to the contrary, that the legal title of and to all of the said rest and residue of my estate (which rest and residue is mentioned in the second item herein) shall be vested in my executrix and my executor hereinafter named, and *shall be owned and held by them in and upon the trusts and for the uses and purposes hereinbefore declared of and concerning the same*, with full power and authority, however, in my said wife, during her life, and in each of my said daughters thereafter during her life, to demand, receive and collect the rents, interest or income of the part or share of the estate, to which she may at the time be entitled as likewise to manage, control and look after the estate as though the same were her own absolutely, the duties and office of the trustees hereunder being none other than to sustain and hold the legal title to the estate for the remaindermen. Furthermore it is my will that on the death or resignation of one or other of the trustees hereunder, or any successor of theirs *in the trust, the vacancy shall be filled by those interested in the trust estate, or a majority of*

Md.]

Opinion of the Court.

them, so that there shall be so long as the trust shall continue at least two trustees.'

By the will, he appointed, his wife, Elizabeth V. Gerke, and one, Augustus F. Leidenroth, executors and trustees, to execute the trusts under the will, and upon the death of Mrs. Gerke, the Colonial Trust Company and Mr. Thomas Mackenzie, by a decree of the Circuit Court of Baltimore City passed on the 10th day of June, 1907, were appointed trustees in the place of those named in the will.

We have thus set out the clauses of the will, and the facts of the case, at greater length than usual, in order that it may clearly appear what are the contentions of the parties, and the grounds upon which the Court below rested its decision in determining the rights of the appellees as the representatives of Charles G. C. Ross the grandson of the testator.

As the object of this proceeding is to ascertain what estate Charles G. C. Ross took under his grandfather's will in the property devised, we will now proceed to this inquiry, as the only one here involved.

It is contended upon the part of the appellants that according to the terms of the will, the true intent of the testator was to create a trust estate and that the store house property on Lexington street was to be held in trust and not sold, until after the death of the testator's last surviving daughter and until his youngest grandchild shall become of age. That the conditions of the trust are not in restraint of alienation nor is the limitation here imposed repugnant to the nature of the estate granted Charles G. C. Ross, nor does it violate or conflict with the rule against perpetuities. And it was also contended that by a proper construction of the will it was the intention of the testator so to leave the estate to his wife, and after her death his three daughters should take and enjoy the same, for and during their natural lives, in the same manner as their mother had enjoyed it during her life, and that only after the death of the last survivor and not until then and

then only after the youngest grandchild had come of age, was the estate, to vest in those of his grandchildren who may be living at that time and their descendants.

It appears, that the contentions of the appellants, the daughters of the testator, were overruled, and those of the appellees, upon the construction of this part of the will, were sustained, by the Court below.

By its decree of the 21st of March, 1910, the Circuit Court of Baltimore City, held, that Charles G. C. Ross took an absolute equitable estate in one-eighth of the rest and residue of the estate of Charles Gerke, as mentioned in the third and subsequent paragraphs of his will subject to the life estate of the wife of Charles Gerke, and to the (\$6,000) six thousand dollars bequest in favor of Walter Duncan Gerke, and his descendants, and that Elizabeth V. Gerke, widow of Charles Gerke being deceased, there is now vested in the Colonial Trust Company as administrator of Charles G. C. Ross, deceased, subject to the aforesaid (\$6,000) six thousand dollars bequest, in favor of Walter Duncan Gerke, the one-eighth absolute estate in said rest and residue consisting of the leasehold property known as No. 5 West Lexington street, in the City of Baltimore, and which interest in the estate, the Colonial Trust Company administrator, will proceed to administer and distribute, under direction of this Court which hereby secures jurisdiction over the estate of Charles G. C. Ross, deceased.

And it further held, that the clause of the will postponing the sale of the property, "until after the death of the last surviving daughter (of Charles Gerke) and until after the youngest grandchild should become of age," has no legal binding effect so far as the one-eighth interest of the estate of Charles G. C. Ross is concerned, and is therefore, as to this interest decreed to be null and void as repugnant to the nature of the estate previously devised, to Charles G. C. Ross.

Md.]

Opinion of the Court.

And it was further decreed that the papers be referred to one of the Auditors of the Court to state an account with the Trust Company, administrator of Ross and make distribution of the estate among the parties entitled thereto, subject to the further order of the Court.

Now looking to the whole will in this case and giving effect to the intention of the testator, as manifested by the language employed by him, we cannot concur in the conclusion reached by the Court below, upon the construction of the clauses of the will relating to the interest and estate, the testator desired his grandson, Charles G. C. Ross to take, and upon what events he designed the estate to vest.

There can be no doubt, it seems to us, as to what was really intended to be accomplished and what was designed by the testator in the will here in question and what estate he desired each devisee to take, because the language employed by him is clear and direct and entirely free from uncertainty or ambiguity. And that being so, we fail to find any ground, upon which a Court would be authorized to declare any part of the will void.

It is a settled rule in the construction of wills, first, to ascertain the intention of the testator, from the will itself and then, to give effect to this intention, so far as it is consistent with the rules and policy of the law.

In this case, we think, it is clear, that it was the undoubted intention of the testator that the store-house property, known as No. 5 West Lexington street was to be held in trust and should not be sold until after the death of his last surviving daughter, and until his youngest grandchild shall become of age. Because, he provided "then it shall be sold" and the ground rent paid off and the balance equally divided among my grandchildren then living and the issue then living of any deceased grandchild.

It is also certain that he intended the property should be held in trust as stated in the will, because after so providing, he states in a subsequent clause of the will: "I will here take

occasion to say, it is my will and wish notwithstanding anything hereinbefore contained to the contrary, that the legal title of and to all of my estate * * * shall be vested in my executors * * * and shall be owned and held by them in and upon the trusts and for the uses and purposes hereinbefore declared, * * * the duties and office of the trustees being to sustain and hold the legal title to the estate for the remaindermen." And he further, provides, that on the death or resignation of one or other of the trustees or any successor of theirs in the trust, the vacancy shall be filled by those interested in the trust estate or a majority of them, so that there shall be so long as the trust should continue, at least, two trustees.

It would be difficult, it seems to us, to find words that could more clearly and definitely set forth the intention on the part of a testator, that a trust estate should be created and then to continue, than those used by the testator in this case. And that being so, it would not only defeat the manifest intention of the testator, to sustain the construction of the will contended for by the appellees, but would practically direct the sale at once of the Lexington street property, in contravention of the plain terms of the will itself.

The testator not only states "that it is my wish and will that the Lexington street property shall not be sold until after the death of my last surviving daughter and my youngest grandchild shall become of age, but he further states that then it shall be sold and the ground rent paid off and the balance equally divided among his grandchildren. And he also states, that "it is further my will that my children shall have in the meantime no right or authority to dispose of their interest in said store property," and that his wife during her life, and that his daughters during their lives, should have full power to demand, receive and collect the rents, interest and income, * * *, and to manage, control and look after the estate as though the same were his own absolutely.

Md.]

Opinion of the Court.

In this case, we think, the words "will and wish" are clearly mandatory and declaratory of the intention of the testator to create a trust, and in no way to complicate the estate previously devised to the grandson, Charles G. Ross, because the testator states in the latter part of his will, that "it is my will and wish, notwithstanding anything hereinbefore contained to the contrary" the property shall be held in trust as therein stated. The presumption ordinarily arising where there is first an absolute gift and thus following it a clause cutting down the estate devised, to a life estate or an estate less than an absolute interest that the testator intended the absolute gift to prevail does not arise in this case and cannot apply to a will containing the provisions and language of this will. To sustain the decree of the Court below, would not only defeat the entire purpose of the testator's will, but deprive the life tenants of the estate he desired them to enjoy.

The limitation, that the property should not be sold until after the death of his last surviving daughter and until his youngest grandchild shall become of age does not contravene or violate the rule against perpetuities, because such grandchild must be born within a life in being at the death of the testator.

We are, therefore, of the opinion, for the reasons given, that the lower Court committed an error in its construction of the will of Charles Gerke, and its decree of the 21st of March, 1910, will be reversed.

We further hold, there was also error in the orders of the 3rd of June, 1910, overruling exceptions and finally ratifying the report and account of the Auditor, in pursuance of the decree of the 21st of March, 1910.

It follows from the conclusion we have reached that the estate of Charles Gerke will be held in trust, according to the terms of the will, and will be administered as a trust estate, as it has been since the death of the testator in March, 1891, in the Circuit Court for Baltimore City, under the

orders of that Court. The administrator of Charles G. C. Ross, deceased, being entitled to one-eighth of the rents and income from the property subject to the provision in the will that the warehouse property, on Lexington street shall not be sold until after the death of the last surviving daughter of Charles Gerke, and his youngest grandchild shall have become of age.

The decree and orders appealed from will each be reversed and the cause remanded, to the end that a decree may be passed in accordance with this opinion.

Decree and orders reversed, cause remanded and the costs to be paid by the Colonial Trust Company, Admr. of Charles G. C. Ross, deceased.

FRANK M. DUVALL vs. THE MARYLAND ELECTRIC RAILWAYS CO.

Appeal Dismissed for Delay in Transmission of Record.

Rule 16 of this Court provides that an appeal will not be dismissed for failure to transmit to this Court the record on appeal within the prescribed time of three months from the date of the appeal, if the appellant makes it appear that the delay was caused by the negligence or omission of the Clerk of the Court below or of the appellee. In this case, more than six months elapsed between the entry of the appeal and the transmission of the record. This delay was not caused by the Clerk of the trial Court. The appellant alleged that the appellee retained in his possession a typewritten copy of the evidence and thus prevented him from preparing the bill of exceptions. The appellee obtained possession of the copy of

Md.] Opinion of the Court.

the evidence more than three months before the transmission of the record. *Held*, that under these circumstances, the appeal should be dismissed.

Decided January 10th, 1911.

Appeal from the Circuit Court for Anne Arundel County.

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, PATTISON and URNER, JJ.

Robert Moss (with whom was *James M. Munroe* on the brief), for the appellant.

J. Wirt Randall, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appeal before us was taken from a judgment in assumpsit against the appellant, as defendant below, in the Circuit Court for Anne Arundel County.

The final judgment in the Circuit Court was entered on August 19th, 1909, and the appeal therefrom was taken on October the 6th, 1909. After several extensions of the time for signing the bills of exception, made upon the application of the appellant, they were signed and filed on February 3rd, 1910, which was within the limit of the last order of extension. The transcript of the record was not transmitted to this Court until April 16th, 1910.

A motion has been filed in this Court by the appellee to dismiss the appeal because the transcript of the record was not sent here within the time required by law. In support of the motion there was filed an affidavit of William N. Woodward the deputy clerk of the Circuit Court for Anne Arundel County which states:

(1) That he as such deputy has charge of the dockets of said Court and of the filing of papers in cases thereon and

of making out the transcripts of records for the Court of Appeals.

(2) That in the present case the bills of exception were filed on the 3rd of February, 1910, and that within a few days thereafter the record in the case was ready for transmission to the Court of Appeals, but its transmission was delayed until the 15th day of April, 1910, because the costs of the record were not paid in the clerk's office of the Court below until the last named day.

(3) That the delay in the transmission of the record to this Court was not occasioned by the neglect, omission or inability of the clerk or any one connected with his office or of the appellee.

The appellant filed an answer to the motion to dismiss, in which he averred that the delay in preparing the bills of exception was largely due to the fact that the appellee's counsel retained in his possession a typewritten copy of the testimony, made from notes taken by a stenographer during the trial, for so long time that it did not come into the possession of the appellant's counsel until January 14th, 1910.

The answer was accompanied by an affidavit in rather general terms from the stenographer, who made the copy of the testimony, touching its retention by the appellee's counsel, and also one from the deputy clerk Woodward, which did not materially vary the statements made in his previous one. The appellee's counsel filed in reply an affidavit contradicting some of the more important statements of the one made by the stenographer and asserting that the typewritten copy of the testimony had been made for the appellee at its own expense and was its private property.

We deem it unnecessary to discuss the three last mentioned affidavits because the appellant's answer itself shows him to have been guilty of such laches in transmitting the record to this Court as to require the dismissal of the appeal.

Md.]

Opinion of the Court.

In all appeals to this Court the appellant is responsible for having a transcript of the record duly prepared and transmitted here within the prescribed time. That time under our rules, in appeals from Courts of Law, is within three months from the time of the appeal taken. Rule No. 16 affords the appellant relief from the consequences of delays for which he is not responsible by providing that no appeal shall be dismissed for failure to transmit the transcript within the prescribed time upon his making it appear to this Court that the delay was caused by the neglect, omission or inability of the clerk or appellee, but such neglect, omission or inability will not be presumed. When the Court below has by granting extensions of the time for signing the bills of exception rendered it impossible to have the transcript prepared within the prescribed three months we have allowed such further reasonable time for its transmission as in our judgment was proper.

In the present case more than six months elapsed between the taking of the appeal and the transmission of the transcript. The appellant attempts to account for this delay by asserting that the appellee's counsel retained for a long time in his possession a typewritten copy of the evidence in the case which was requisite for the preparation of the bills of exception. Assuming that the appellant was entitled to the possession and use of that copy of the evidence, his deprivation of it for a time affords no sufficient excuse for his great delay in transmitting the record. He asserts in his answer that he got possession of the copy on January 14th, 1910, which was more than three months before the transcript of the record was sent to this Court. The affidavit of the deputy clerk completely negatives the theory that any portion of the delay is chargeable to the clerk or his subordinates.

Under these circumstances we feel that it is our plain duty to dismiss the appeal.

Appeal dismissed with costs.

Md.]

Syllabus.

HENRY A. BREHM vs. THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

Appeal—Inconsistent Contentions—Accident at Railway Crossing—Negligence of Driver—Duty to Look and Listen Continues Until Reaching Track.

In an action to recover damages for the killing of the plaintiff's horses while being driven over a railway crossing, the declaration stated that the driver was the servant of the plaintiff and was using ordinary care at the time of the accident, and at the trial, the plaintiff asked that the question of the driver's contributory negligence should be submitted to the jury. *Held*, that, on appeal, the plaintiff will not be heard to say that the driver was not his servant, and the horses were not being used in his business at the time of the injury, and that therefore he was not responsible for the negligence of the driver.

The rule that when the view of the tracks at a railway crossing is obstructed, it is the duty of a person about to go upon them to stop, look and listen for approaching trains, is not complied with by doing so at a point where obstructions prevent him from seeing, and when, if he had stopped nearer the track in a place of safety, he could have seen and heard the train. It is, in such case, the duty of the driver to continue to look until he reaches the track.

The driver of a wagonette drawn by two horses and containing seven persons approached a railway crossing in the country. Both the road on which he was driving and the railway tracks were in cuts near the crossing. The driver knew that trains were frequently running there at high speed and was well acquainted with the dangerous character of the crossing. When the horses reached the track they were struck by a fast train and killed, but the persons in the wagon were not

seriously injured. In an action to recover damages, the plaintiff's evidence was that no whistle or bell was sounded for the train; that the driver stopped thirty feet from the crossing and looked and listened, without hearing a train, and that then he drove rapidly on the crossing. The evidence in the case established that from the point where the driver testified that he stopped, in the cut, neither he nor his passengers could see a train coming from the north except for a short distance, but that, beginning at a point twenty feet from the nearest track, there was a clear view up the track for over a mile. *Held*, that the driver was guilty of gross negligence in driving rapidly over the crossing after he had only stopped and looked for a train at a point whence it could not be seen, and when it could have been seen and heard from a safe place nearer the track if he had then looked and listened.

Decided January 10th, 1911.

Appeal from the Court of Common Pleas (HEUSLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and PATTISON, JJ.

S. S. Field (with whom was *Samuel Regester* on the brief), for the appellant.

Shirley Carter, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellant sued the Pennsylvania Railroad Company and the appellee for killing two of his horses, while being driven at a point on the railroad used by the defendants, where a public highway is alleged to cross the tracks. During the trial the plaintiff dismissed the case against the Pennsylvania Railroad Company and it was afterwards with-

Md.]

Opinion of the Court.

drawn from the jury on a prayer offered by the appellee, on the ground of contributory negligence of the driver.

The first two bills of exception embrace rulings on the admissibility of evidence and the third presents the action of the Court on the prayers. As that is the most important question, we will first consider the prayer of the defendant above referred to.

The accident happened about 6.35 o'clock on the evening of July 4th, 1908. Albert Jacobs, who then lived on the Wilton Stock Farm, which belonged to the plaintiff, and of which Dr. Tubbs, the stepfather of Jacobs, was manager, was driving two horses of the plaintiff which were hitched to a wagonette. There were seven persons in the wagonette, including the driver and a little girl. Although the appellee does not concede that the road over which the team was being driven was a public highway, there was undoubtedly evidence tending to show that it was, and it will be so treated in the consideration of the case. The railroad at the point where the accident happened runs north and south and the highway runs east and west—at least they are sufficiently near those directions for the purposes of our discussion, and we will so speak of them.

There are two tracks at this crossing, which is known as Dinsmore's Crossing—the one on which the trains run from Philadelphia to Baltimore being spoken of in the evidence as the south track, and the other the north track. The nearest station north of the crossing is Swan Creek Station, and the nearest south (towards Baltimore) is Aberdeen Station. Oakington Signal Tower is 6,800 feet, Swan Creek Station 2,700 feet, a bridge over Swan Creek about 1,400 feet, and there is a whistling post 1081 feet north of the crossing. There are about two miles of straight track from Oakington past Dinsmore's Crossing to Aberdeen. There is a down grade from a point about a thousand feet south of Oakington to a point near the Swan Creek bridge, where an upgrade begins and continues to Aberdeen, about a mile and a half—

there being this upgrade on the southbound track at Dinsmore's Crossing. A little north of Swan Creek Station there is an overhead bridge which carries a highway over the railroad tracks, known as the Robin Hood Road.

The appellant argued that the driver was not the plaintiff's servant and the team was not being used on his business, and hence he was not responsible for the contributory negligence of the driver, even if that be held to exist. But the declaration expressly alleges in the first count that the team was being driven "by the servant of the plaintiff, using due care," and in the second count it is alleged that the carriage and horses were being driven "by the servant of the plaintiff," that "the driver of said horses used ordinary and reasonable care in approaching and going upon said crossing," and "without any negligence on the part of the plaintiff or his servant the said horses were killed," etc. Moreover, the plaintiff upon the stand did not make such claim as was made at the argument, and by a prayer he offered he sought to submit the question of the contributory negligence of the driver to the jury. Under such circumstances we are not called upon to enter upon a discussion of the effect of the alleged contributory negligence of the driver upon the right of the plaintiff to recover, as the plaintiff cannot bring the defendants into Court to answer the charges thus deliberately made by him, take such position as he did during the trial, and then ask us on appeal to adopt a view wholly contrary to the one thus taken by him, which was not even raised in the lower Court so far as disclosed by the record.

There is a conflict between the witnesses for the plaintiff and those for the defendant as to whether any signals were given of the approach of the train, but as the case is presented we must assume the testimony of the witnesses for the plaintiff to be correct, as far as it goes. Having disposed of those questions we will now refer to such of the testimony reflecting upon the contributory negligence of the

Md.]

Opinion of the Court.

driver as we deem proper, to show why we reach the conclusion to be announced.

About the place where the accident occurred the railroad runs through a cut and the highway is also in a cut to a point near the railroad tracks. The driver and other witnesses who were in the wagonette testified that they stopped in the cut, as they approached the crossing, about thirty feet from it and listened for trains; that from that point they could not see any distance up the track; that they knew the crossing was a dangerous one, and that one of them (Mrs. Still) pointed to the sign board which was at the crossing and said: "Now, stop, look and listen." After stopping and listening, not hearing any train, the driver started the horses and just as they got upon the southbound track they were struck by the train known as the "Congressional Limited," which was running very fast—the engineer said he thought about 50 miles an hour at that point, although sometimes it reached a speed of 65 or 75 miles an hour between Wilmington and Baltimore. The horses were killed and the wagonette and harness were injured but fortunately none of the persons riding in the wagonette were seriously hurt, and it was not even upset.

It had a cross seat in front on which sat the driver (Jacobs) and his grandmother (Mrs. Still), and there were two seats running lengthwise of the wagonette, one on each side, and those sitting on them entered from the rear. Mr. Watson was seated on the left-hand side, directly back of Mrs. Still, Mrs. Tubbs, the mother of Albert Jacobs, was sitting in the rear on the south side. Mrs. Jay was somewhere on that side and the others were not located in the testimony.

It is clear that from where they said the wagonette was stopped neither the driver nor anyone in it had an opportunity to see a train approaching from the north—nor had they the same opportunity to hear that they would have had, if they had not been in the cut. The Baltimore and Ohio

railroad also runs near the appellee's road and one of the witnesses said they could not hear any trains on either road. The engineer, fireman, conductor and baggage master, who were on the train, and a track walker who was approaching the crossing swore that the signal was given for the crossing, but the occupants of the wagonette swore they did not hear any signal, and one or two of them said that none was given and, in considering this prayer we must assume the testimony of the latter to be correct. If the train was running fifty miles an hour it only took sixteen seconds to go from the whistling post to the crossing, and if sixty miles only twelve and a fraction seconds. Or to state it another way, the train in the one case would move about sixty-seven feet and in the other about eighty-eight feet, in a second, while if the vehicle was going at the rate of six miles an hour that would be nearly nine feet a second or at four miles an hour about six feet a second.

But, although the witnesses for the plaintiff testified that they stopped about thirty feet from the crossing, it is very evident that they had no definite knowledge of the distance, and none of them explained whether they meant that the horses' heads were that distance, or whether they referred to the wagonette, and if so, what part of it. As Dr. Tubbs testified that the distance from the horses' heads to the eyes of the driver was seventeen feet and to the rear end of the wagonette about twenty-six feet, it will be seen that it was a very indefinite statement to say they stopped thirty feet from the crossing. Jacobs said: "I stopped, I guess, about thirty feet back." Mrs. Tubbs said she would not like to say how many feet, or how close they were, but she thought that the horses' heads would have been on the track before they could have seen far enough down the track to be safe. Mrs. Jay said, "we stopped, I suppose, about thirty feet back." She also said the cut was higher than the wagonette. Mr. Watson, whose testimony was ruled out, said, "when we got with-

Md.]

Opinion of the Court.

in about thirty feet of the track the driver stopped the team."

On the other hand, Mr. Stone, a civil engineer and Assistant Supervisor of the Maryland division of the railroad company, said he measured from the west rail of the southbound track, in the middle of the road, four distances, 12, 20, 25 and 30 feet; that standing 12 feet from the track on the road he could see north, up the railroad track, to Oakington signal tower (6,800 feet), could see from that point the railroad track and a train on it anywhere between the signal tower and the crossing; from a point 20 feet from the west rail there is the same view as at the point 12 feet; that at 25 feet from the track there is a clear view of the railroad track for 3,000 feet, or to a point beyond Swan Creek Station, could have seen a train anywhere in that distance on the southbound track, and that at a point 30 feet from the west rail he could see 235 feet up the track. On cross-examination he said the right of way of the railroad is seventy feet wide, that the center of the right of way is midway between the two tracks, and from that center line to the west rail is a little less than eight and a half feet. It was therefore twenty-six and a half feet from the west rail of the southbound track to the west side of the right of way. He also said that "after you pass 30 feet from the west rail the view of the track to any considerable distance was cut off by the bank." Six or seven witnesses who were present when the measurements were made and the observations taken corroborated Mr. Stone. One of them was a trackwalker on that section of the railroad and was near the crossing when the accident happened. He said that the grass had been mowed on the west side of the track, north of the crossing, all the way up to the top of the bank, and about three or four feet over the top just before the day of the accident, and he and others swore that there had been no changes in or about the crossing from the time of the accident to the time of the observations.

Although the observations were made in the winter time—just before the trial of the case—and the accident was on July 4th, it is perfectly apparent that the witnesses for the plaintiff did not accurately know the distance from the track at which they stopped. It is not shown what part of the wagonette Mrs. Jay was in, but she said, “The cut is higher than the wagon,” and it is evident that she was at least far enough back to be in the cut. She admitted on cross-examination that she did not know “whether it was thirty or forty feet, because I cannot judge.” Jacobs’ testimony on this point was: “Q. What prevented you from seeing north? A. The bank. Q. Anything else there to obstruct the view? A. No, sir; nothing but a bank and a little clump of wood, but that is farther up and the bank was the only thing.” It must be true that if there is in the winter time such views as were testified by the seven or eight witnesses from the points indicated, *the bank* could not have obstructed their view while the parties in the wagonette were at any of those points. It would further seem to be perfectly apparent that if their view was obstructed at any of those points, it was only by grass or little bushes which is all they testified to as being there in July, and it is difficult to understand why they could not have at least heard the rumbling of a train going fifty or more miles an hour, if there was no other obstruction and they were not behind the bank. The bank might possibly account for their not hearing, but it cannot be said that if a train is going upgrade at such a speed, or even if there was no grade, that persons listening for it could not hear its rumbling, if there was no other obstruction than grass and some small bushes. It is true that Mr. Watson said that there was a downgrade from Swan Creek Station to the place of accident, but the assistant supervisor of the road and the engineman certainly knew more about the grade than he did, even if his testimony is treated as before us.

The testimony therefore clearly shows that Jacobs must have stopped the horses when he was so far back that he was

behind the bank, where they could not hear the noise the train must necessarily have made, and then did not stop again. If he could not hear or see where he stopped, then clearly he should either have stopped again, or have gone so carefully and slowly toward the track that he could at least have the horses under control. If Dr. Tubbs is correct in saying that it was seventeen feet from the horses' noses to the eyes of the driver, and that all view was cut off from that point, and they could not hear a train running fifty miles an hour, a prudent driver might well have suggested that Mr. Watson or someone get out and look up and down the tracks. Mrs. Jay said the trains did not always whistle at the post, all of them knew the crossing was a dangerous one and the tracks could have been seen for two miles, up and down, from this crossing. But without deciding that it was contributory negligence for the driver not to adopt that course, there is abundant evidence to show that the accident was caused by his recklessness in rapidly driving towards the crossing. If he could not see or hear the train from the point he stopped until the horses were on the track then it was gross negligence to approach the track at such a speed, and if he could have seen or heard it *within* thirty feet of the crossing, as the testimony of the defendant's witnesses tends to show, then it was only by reason of his negligence that he did not see or hear it.

The wagonette was large enough to carry ten passengers, and on this occasion there were seven, including the child and driver. Jacobs said: "I stopped, I guess, about thirty feet back, and did what the law requires, stop, look and listen. You cannot see anything, cannot see any distance up the track, and I started off and started my team quickly to get on the track and get over it if I could. If there was anything coming, I couldn't see anything, and when I got over and looked south Mr. Watson made some exclamation—I don't know just what it was—but I looked that way (indi-

Md.]

Opinion of the Court.

cating) and I immediately took hold of my team and tried to pull them up but the momentum was so great I could not stop them." Mrs. Tubbs said: "We started up and if I remember correctly, I asked Albert to hurry across, because that was the way I always did it myself, and I would listen and then hurry across for fear another train would catch me in the meantime." Again she testified on cross-examination: "Q. And then you say you told him to go ahead quick when he started up? A. Yes, sir; that is always my instructions. Q. And he did start up quick? A. Yes, sir." Mrs. Still testified, "My daughter said we will hurry across anyhow and my grandson was sitting on my right, and he straightened out. The horses turned and he started as fast as he could." She also said "we heard nothing at all but there are so many trains on that road and we are always fearful in crossing."

Jacobs was looking south, and the only one who was supposed to look north sat in the wagonette facing the south, and had to turn around to look north. The driver undertook to explain his inability to stop the team by saying that owing to a downgrade on the highway the momentum was so great that he could not stop them. While some of the witnesses so speak of the grade, all of them admit it was a very slight one. The track walker said, "the road is a slight down grade to the railroad crossing; a grade of about three inches on either side, I don't think over that." He did not explain whether he meant it was three inches to the hundred feet or what, but it was evidently a slight grade. But if there was a grade which interfered with Jacobs stopping the horses, as soon as he could otherwise have done, it made his negligence all the greater. He and the others in the wagonette were familiar with the road, and to start rapidly down grade with a heavy wagonette, capable of carrying ten passengers and actually having seven in it, toward railroad tracks, with no opportunity to see or hear the approach of trains, as the appellant claims, until they were almost on the crossing, was evidence

of greater recklessness than can often be found referred to in the reported cases. The horses were perfectly gentle—Mrs. Tubbs said they were “not in the least” afraid of trains, and Dr. Tubbs said, “they were perfectly safe for everybody, and that is evidenced by their sacrificing their own lives that day by obeying orders.” As the driver and others with him knew the dangerous character of the crossing, that trains were frequently passing and must have known the great speed at which they did pass, as the most of them lived in the neighborhood, if they could neither see nor hear the approach of trains, until they were nearly on the tracks, surely the most ordinary care demanded of him that he should stop his horses before crossing the tracks, and not start rapidly at a point thirty feet off and hurry through this peculiar space (where trains could neither be seen nor heard, although within a few feet of the tracks which were straight for two miles), until they finally reached the danger point, when it was impossible to check the horses by reason of the momentum which was largely caused by the speed at which he was going. If a driver is caught when attempting to cross over in front of a train which he sees, he is generally held to be guilty of contributory negligence, and it is not easy to understand why he is not equally so when he is caught by one which he can neither see nor hear, but has reason to fear that it may be approaching, and yet does not adopt the precautions which every person of ordinary intelligence ought to know should be adopted.

Jacobs’ statement, that “I started off and started my team quickly to get on the track and *get over it if I could*,” is of itself sufficient to convict him of gross negligence. It is true he and the others in the wagonette said they stopped, looked and listened at the point about thirty feet away and that they neither heard nor saw any trains, but that was, according to their testimony, because they could not see or hear anywhere they were. The fact is, as shown by the results, that this

Md.]

Opinion of the Court.

train was on the southbound track, and if the plaintiff's testimony is correct that those in the wagon did listen but they did not hear it, it must have been because they could not have heard it where they stopped, but even if no whistle was blown they certainly could have heard the rumbling of the train if they had stopped nearer the track, and we think the testimony conclusively shows that they could have seen it in time to avoid the accident, if they had looked from a point nearer the crossing.

It is now thoroughly established in this State that if the view be obstructed it is the duty of a traveler to stop, look and listen before attempting to cross a railroad. That rule is not complied with by merely stopping, looking and listening once, if the object in doing so cannot there be accomplished, but can be closer to the tracks. A traveler might as well stop, look and listen a quarter of a mile from the railroad as thirty or forty feet away, if he can neither see nor hear at the latter point, although he can before he attempts to cross the track. Of course, Courts cannot fix any definite distance from the tracks at which travelers must stop, but that requirement varies according to circumstances. It may be that the traveler can better determine whether it is safe to cross by stopping at a point fifty or a hundred feet from the crossing than he could by stopping closer, as sometimes the view up and down the track is more extensive at a remote than at a closer point, owing to the conditions, but it would be useless to adopt the rule which requires a traveler on a highway to use care, before attempting to cross railroad tracks, if such care is to be exercised away from the track, and then utterly neglected as he approaches near to it. That rule is for the protection of travelers on a highway as well as of the passengers and employes on the trains. It is not by any means an unheard of thing for an engineman or fireman to lose his life or limb, or at least be seriously injured, by reason of his engine being thrown off the track by the

careless act of some traveler on a highway. The traveling public of the present day demands speed, and distance is overcome by it. It is to be hoped that the day is not far distant when grade crossings will be unknown—at least such as are frequently used by the public—but until that time arrives the law at least must protect passengers and trainmen to the extent of discouraging recklessness on the part of those crossing the tracks.

Without deeming it necessary to review the authorities at length, there are some in this State which we think are conclusive against the right of the plaintiff to recover. The cases of *Phil. & Balto. R. R. Co. v. Holden*, 93 Md. 417, and *A. W. & B. R. R. Co. v. State, use of Hickox*, 104 Md. 659, are perhaps more applicable to this than any of the others. It is true that in both of them the accidents were at private crossings, but in the former, where the negligence of the defendant relied on was the failure to give a signal at an accustomed place, the Court, after saying that the railroad company was not required to give a signal at private crossings, said: "But, if we assume that the plaintiff had been injured at a public crossing, there can be no doubt that the failure to give the signal would not have been admissible to excuse him, that is, to show he was not guilty of contributory negligence." In the *Hickox* case we referred to a number of others, including that of *Hatcher v. McDermot*, 103 Md. 78, where we held that "the plaintiff was guilty of contributory negligence for crossing an electric railway on a public crossing without having again stopped, looked and listened for a car, after he left a point about one hundred and thirty feet distant from the crossing, where he did stop, look and listen, but where his view was obstructed to some extent." We also referred to *Meidling v. United Ry. Co.*, 97 Md. 76, in which we quoted with approval from *Keenan's case*, 202 Pa. 107, where it was held to be the duty of the plaintiff "to continue to look until the track is reached." In that case the

Md.]

Opinion of the Court.

plaintiff could have seen the approach of a car from a point where he did look until he reached the crossing, as there was no obstruction excepting the curtains on his wagon, while in this case the driver could not see a train, and did not hear one from the point where he stopped, and he then ceased his vigilance. As said in *Keenan's case*: "But his misfortune is that he was careful but for an instant, when he should have continued to be watchful until the track—the real point of danger—was reached." In *Hickox case* we said: "It is no excuse for one not to stop, look and listen when he is near the track because he did so further away at a point where he could not see, if he looked, and according to the plaintiff's contention, could not hear if he listened. If his view was obstructed, and the sound interfered with, it made it all the more important for him to stop again." Again, in speaking of the cross-ties, which were the obstruction in that case, we said: "Even if they were only ten or twelve feet away, if up to that point they obstructed the view from the private road, it was the duty of the deceased to again stop, look and listen for the train, which he had reason to expect." The learned attorney for the appellant undertook to make some distinction between that case and this on account of that expression, "which he had reason to expect." But in this case the train which struck the horses was running on schedule time, and Mrs. Jay said: "The train was the Congressional Limited, going very fast, it always goes fast." Mrs. Still, who was sitting by her grandson, the driver, said, "there are so many trains on that road, and we are always fearful in crossing." All of them showed great familiarity with the railroad at this crossing, and they knew perfectly well that a train might be coming at that very time. Even if there was not one due, as there was, they knew, as their conduct as testified to by them shows, that a train might pass there at any time. So without citing other cases, those and others referred to in them sufficiently show the rule in this

State to establish beyond controversy that the action of the driver on this occasion was not only contributory negligence, but was of a most reckless character, under the circumstances we have related at length.

Having reached that conclusion, it would be useless to refer to the other exceptions, as different rulings on them, or either of them, would not change the result.

Judgment affirmed, the appellant to pay the costs, above and below.

ADAM SPARR vs. THE UNITED RAILWAYS AND
ELECTRIC COMPANY OF BALTIMORE.

Collision at Electric Railway Crossing in Open Country—Contributory Negligence.

An old man driving a cart on a road running through open fields to a garbage dump came to a point where the road crossed the double tracks of the defendant electric street railway. He testified that he looked to see if a car was approaching from either direction, but not seeing or hearing any, drove on, and that the wheel of his cart, when it was on the first track, was struck by a car and the injuries inflicted upon him to recover for which this suit was brought. The accident occurred in broad daylight, and both the plaintiff and the motorman in charge of the car had an unobstructed view of each other. *Held*, that, if it be assumed that there was some evidence of negligence on the part of the defendant, yet the plaintiff's contributory negligence was such as to bar the right to recover, since he could have seen the approaching car for a distance of more than five hundred feet, and if he looked and saw it he was negligent in attempting to cross in front of it; and if he did not see it, it must have been because he did not really look, and it was negligence to start across

Md.]

Opinion of the Court.

the track without looking to see if a car was coming. Under these circumstances the motorman had a right to assume, if he saw the plaintiff approaching the track, that he would not attempt to cross in front of a rapidly approaching car.

Decided January 10th, 1911.

Appeal from the Court of Common Pleas (HEUISLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

James J. Lindsay (with whom was *John G. Nagengast* on the brief), for the appellant.

Joseph C. France and *J. Pembroke Thom*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appeal in this case is from a judgment in favor of the defendant in a suit to recover damages for injuries alleged to have been caused by the negligence of the United Railways and Electric Company of Baltimore.

There is but one exception in the case, and that is to the granting, at the conclusion of the evidence offered by the plaintiff, of the defendant's prayers, instructing the jury that under the pleadings in the case, there was no evidence legally sufficient to entitle the plaintiff to recover, and that the uncontradicted evidence in the case shows that the plaintiff was guilty of negligence directly contributing to the accident, and that their verdict should be for the defendant.

The accident occurred within the limits of Baltimore City, on a road called the Old Annapolis road or Russell street, and at the point where the accident happened the road runs through an open field. The two tracks of the appellee, which are constructed like railroad tracks, with T-rails, are on the

west side of the road, and the driveway is on the east side. To the west of the tracks there is a field which was used as the City's dumping ground, and at the place of the accident the spaces between the tracks of the appellee were filled in with cinders or ashes so as to make a crossing from the driveway to the dump. About five hundred feet south of this crossing there is a bridge called Harmon's bridge which crosses Gwynn's Falls, and the railway crosses the Falls on a trestle running parallel with and west of the bridge. There is no grade, or anything to obstruct the view, between the crossing and the bridge, and north of the crossing there are no houses for several blocks.

On the morning of the accident, July 17, 1909, the plaintiff was engaged in hauling brick to the dump, and was driving a one-horse cart down the Old Annapolis road towards the crossing and in the direction of the bridge. According to his testimony, he was sitting on the "left-hand side of the cart driving the horse," and when he got to the crossing, and was making the turn to cross the track, he looked both ways to see if a car was coming. He said: "It is an open field," and that he could see all around; that the turn he made was about the length of a horse and cart and that as he made the turn he had an unobstructed view of the tracks; that he could see nearly half a mile off, and had a clear view of the tracks beyond the bridge; "the further off I look the better I can see.—My hearing is pretty tough;" that he "didn't hear any noise because there wasn't any bells ringing or nothing else;" that the car struck the cart and injured him about two or three seconds after he looked, and as he was crossing the first track. It further appears from his testimony that he was about seventy-three years of age; that he had been hauling to this dump for many years, and had been using the crossing in question every day for the previous week.

Witness Shue, who saw the accident, says that he was driving a garbage cart just behind the plaintiff, and was on his way to the dump; that the wheel and front part of the

Md.]

Opinion of the Court.

plaintiff's cart was struck by the car just as the plaintiff was crossing the first or east track; that at the crossing a person can see beyond the bridge; that he saw the car, and that when he saw it it was at the bridge and the plaintiff was not on the track, he was "a yard or two from it," but was just about to cross it, and did not stop until the car struck him; that he cannot tell how fast the car was going because he does not know how fast those cars can run, but that it was going at a pretty good speed; that there were two men on the front of the car; that one of the men had "a full uniform on," and the other man had a uniform cap on, and that the one that had the cap on was running or controlling the car.

This is substantially all of the evidence in the case, having any relation to the questions we have to consider. Even assuming that there is some evidence of negligence on the part of the appellee, we think the record discloses a clear case of contributory negligence. JUDGE ALVEY said in *State, use of Bacon v. R. R. Co.*, 58 Md. 482: "It is difficult to suppose that they did not see the approaching train; with its glaring headlight confronting them, in time to enable them to step from the track. If the deceased did see or hear the approaching train in time, and failed to get out of the way, he was certainly guilty of the grossest negligence; and if he did not see or hear the approaching train, it must have been because he did not use his senses for his protection, and he was therefore guilty of negligence, and that negligence directly contributed to the cause of his death. And upon either of these suppositions (and there can be no other upon the proof offered by the plaintiff), it was quite immaterial that the whistle was not sounded as the train approached the crossing; for conceding that omission to have been negligence on the part of the defendant in respect to the deceased, yet, if the latter saw or heard the approaching train in time to get from the track, the sounding of the whistle would have added nothing to the admonition to escape; and if he did not see or

hear the approach of the train, his own negligence in placing himself in such a perilous situation, and the manifest want of care and attention in the use of his senses to guard himself against the perils that he had voluntarily incurred, so directly contributed to and brought about the occurrence of the accident, that all right of action for and in respect of the alleged negligence of the defendant is completely precluded." In the case of *Phillips v. W. & R. Ry. Co.*, 104 Md. 455, where the plaintiff was riding along a country road, on one side of which ran the track of an electric railway, and turned to cross the track with his back towards an approaching car and was struck and injured, CHIEF JUDGE McSHERRY said: "If the approaching car *could* have been seen by the appellant in time to avoid the collision had he looked in the direction it was moving, and he says he did not see it; then it follows that he did not see it solely because he did not look, notwithstanding he says he did look, unless it is shown that his eye sight was so defective that it was impossible *by reason of that fact*, for him to see it. But there is no pretense that his vision was impaired and hence the conclusion is irresistible that, though he says he looked, he failed to see the approaching car because he did not look; and if he did not look before crossing the tracks he was guilty of sheer contributory negligence." In the case at bar, the appellant could have seen the car approaching from the direction of the bridge for a distance of more than five hundred feet. He says that he could see all around and beyond the bridge, and that the greater the distance the better he could see. It is, therefore, apparent that if he had looked before entering upon the track of the appellee he would have seen the car approaching, and if he did look and did see the car, he was guilty of negligence in attempting to cross in front of it. If, on the other hand, he did not see the car, it must have been because he did not look, and it was negligence on his part to venture to cross the track without observing the precaution of looking to see if a car was coming.

Md.]

Opinion of the Court.

Even if those in charge of the car saw the appellant before he got on the track, they had a right to assume that he would stop in a place of safety and not attempt to cross in front of the car. There is no evidence to show that after the motor-man saw the appellant in a dangerous position he could, by the exercise of reasonable care, have avoided the accident. *McNab v. United Rys. Co.*, 94 Md. 719; *Heying v. United Railways Co.*, 100 Md. 281.

The appellant relies upon the class of cases to which the recent case of *United Railways and Electric Company v. Ward*, 113 Md. 649, and the case of *United Railways and Electric Company v. Watkins*, 102 Md. 267, belong. But as has been frequently stated by this Court those cases have no application to accidents occurring in the open country, where cars are known and permitted to run at much greater speed than is permissible on the crowded thoroughfares of a city, where those in charge are not required to reduce the speed of the car as they approach a road crossing, and where more caution is therefore demanded of persons in crossing the tracks. The fact that the place of the accident was within the City limits can make no difference. The evidence shows that the surroundings were practically the same as if it had been in the open country outside of the limits of the City. *United Railways Co. v. Watkins*, *supra*; *Phillips v. W. & R. Ry. Co.*, *supra*.

As the appellant by his own negligence directly contributed to the accident and injury of which he complains, there was no error in withdrawing the case from the jury, and the judgment appealed from must be affirmed.

Judgment affirmed with costs.

MARY HOLZMAN vs. J. ADOLPH WAGER ET AL.

Validity of Will of Leasehold Property Executed by an Infant.

Code, Art. 93, sec. 316, provides that no will, testament or codicil shall be good and effectual to pass any interest or estate in any lands, tenements, or incorporeal hereditaments unless the person making the same, if a male, be of the full age of twenty-one years, and, if a female, of the full age of eighteen years. *Held*, that this provision has relation to freehold estates in land, and that since a leasehold estate is a chattel, a will bequeathing the same, executed by a male nineteen years of age and of sufficient discretion, is valid.

The circumstance that the owner of a leasehold interest in land has the option of redeeming the rent and acquiring the fee simple does not constitute such leasehold interest an estate in land within the meaning of Code, Art. 93, sec. 316.

A male infant over the age of fourteen years, if of sufficient discretion, may make a valid will of personal property.

Decided January 10th, 1911.

Appeal from the Circuit Court for Baltimore County
(VAN BIBBER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Horton S. Smith, for the appellant.

The question in this case is not whether a leasehold property is personal or real property, but is whether leasehold property subject to a redeemable ground rent is included in

Md.]

Argument of Counsel.

the terms "any interest or estate in any lands, tenements or incorporeal hereditaments?"

The appellant contends that a leasehold estate for 99 years, subject to a redeemable ground rent is within the terms "any interest or estate in lands, tenements or incorporeal hereditaments," and that being included in these terms the testator must have been twenty-one years of age in order that the bequest of the property No. 1008 South Potomac street may stand.

An estate in lands, tenements or hereditaments signifies such interest as the tenant has therein. 2 *Black Coms.*, 103-104; *Venable R. P.*, 7.

And Blackstone divides estates in land into (a) freehold; (b) less than freehold. Estates less than freehold are again divided into (a) estates for years; (b) estates at will; (c) estates at sufferance.

Estate signifies such inheritance, freehold, term of years, tenancy by Statute Merchant, elegit, or the like, as a man lost in lands or tenements. *Coke on Lit.*, secs. 345, 650a.

Estate in lands is an interest in lands by virtue of a contract for the possession of them for a definite and limited period of time. *Bouvier*, 692.

Estates in lands are either freehold or less than freehold, and estates less than freehold arise where one gives land to another to hold for a certain period of time. *Williams R. P.*, 62.

This author gives the principal interests of a personal nature derived from landed property as a term of years, and a mortgage. *Williams R. P.*, 467.

An estate for years is an interest in lands or tenements for a determined fixed period of time, and arise where a man devises lands or tenements to another for a certain number of years. * * * *Venable, R. P.*, 41. *Tiedeman, R. P.*, sec. 26, classifies "estates which may be created in lands" with regard to the "duration of the interest" into (a) estates

of freehold; (b) estates less than freehold, which he again divides into (a) estates for years; (b) at will; (c) from year to year; (d) at sufferance.

Bouvier defines an estate as "The degree, quantity, nature and extent of the interest which a person has in real property." To constitute a tenant for years he must have an interest in the land and a right of possession and use. *Maverick v. Lewis*, 3 McCord, 211.

An estate is the tenant's interest and the term involves the idea of possession. Interests in lands which do not or cannot give a right of possession are classed as rights in lands, as distinguished from estates. *Venable, R. P.*, 8.

An estate becomes vested in the tenant when he takes possession under the lease. *Union Bank v. Gittings*, 45 Md. 196.

It has been held repeatedly in Maryland that a leasehold estate is a Chattel Real and is an Estate less than freehold. *Taylor v. Taylor*, 47 Md. 299; *Alexander v. Sussan*, 33 Md. 17; *Hollander v. Central Metal Co.*, 109 Md. 133; *Devecmon v. Devecmon*, 43 Md. 335; *Venable, Real Prop.*, 40.

To say they are chattels real settles the controversy in this case, for a chattel real is an interest in lands or tenements and furthermore comes within the term "any" as used in the statute. Term "any" means "every." *McComas v. Amos*, 29 Md. 141.

If this be so, then every interest of whatever character in land or tenements is embraced within the terms of the statute.

Had James Deegan any interest in the fee of this property under the lease mentioned?

This Court in discussing whether or not a covenant for perpetual renewal ran with the land has said: "In order that a covenant may run with the land it must respect the thing granted or devised, and the act covenanted to be done or omitted must concern the land or estate conveyed. That the

Md.]

Argument of Counsel.

covenant in this case is within these requirements, as affecting the interest in the land devised, as enhancing the value thereof, and as forming a part of the consideration of the acceptance of the lease by the lessees would seem free from doubt." * * * "The right to renewal constitutes a part of the tenant's interest in the land." *Hollander v. Central Metal Co.*, 109 Md. 156.

In the case at bar the lease contains a covenant of perpetual renewal. The lease in this case was created August 4, 1890, and the reversion and rent is known as a ten-year rent. The reversion is now redeemable by the owner of the leasehold estate. *Code*, Art. 21, sec. 88; *Code*, Art. 53, sec. 24.

In the *Hollander case* (*supra*) there was an express covenant that the tenant might redeem and the Court said: "If the covenant to renew is a part of the lessee's present interest, so is the covenant for the conveyance of the fee. * * * If the estate conveyed to the lessee and the lessee's present interest is, in the one case, not a term for 99 years, but a term for 99 years with a right of renewal, so in the other case the estate conveyed to the lessee, and the lessee's present interest is not a definite term, but the term coupled with the right to acquire the fee."

In the event of a purchase by the lessee of the reversion, the leasehold interest, or estate, would be merged in the greater estate purchased by the lessee. *Hollander case*, 109 Md. 133; *Starr v. Starr M. P. Church*, 112 Md. 181. So that at the time of his death James Deegan had an interest in the fee of this property.

There was no change (in the statute law on this subject) from the time of the passage of the Act of 1798, Ch. 101, S. Ch. 1, to the passage of the Act of 1884, Ch. 393. At the time of the passage of the Act of 1798, Ch. 101, the law in Maryland was: "That wills and testaments made of any manors, lands, tenements or hereditaments by any woman

covert, or person within the age of 21 years, idiot or person of *de non sane* memory, shall not be taken to be good or effectual at law." 34-35 *Henry*, 8 Ch., 5, sec. 18; *Buffheads Eng. St.*, 1461-1601, page 333.

A glance at the sections involved in the *Devecmon case*. 43 Md. 335, will show that they involved only sections 298 and 301 of Art. 93 of Code of 1860, both of which read: "All lands and tenements," and in no way construed section 300, which reads: "Any interest or estate in any lands, tenements or incorporeal hereditaments." The *Devecmon case* therefore cannot be conclusive of this controversy, as it was not construing the same statute nor the same words. That case was deciding the factum of a will; this case involves not the legal factum, but the testamentary capacity of the devisor.

To give to Article 93, section 316, the construction desired by the appellees would be to construe the words "any interest or estate in any lands, tenements or in incorporeal hereditaments" to mean the exact words of the statute of 34 and 35 *Henry* 8, Ch. 5, sec. 18. That statute was repealed by the Act of 1798, Ch. 101, which read into our law the words of Article 93, section 316, and changed the law from "any manor, lands, tenements or hereditaments" to "any interest or estate in any lands, tenements or incorporeal hereditaments."

Wm. H. Lawrence (with whom was *Wm. Grason* on the brief), for the appellee.

The sole question in this case resolves itself into whether or not a male born on the 21st day of July, 1890 (Record. page 4, par. 9), was capable of making a will of leasehold property on the second day of April, 1908, when he was about eighteen years and eight months of age. If, at that time, said deceased infant was capable of executing a valid will of leasehold property, then the action of the Court below in sustaining the demurrer and dismissing the bill, the costs to be paid by the plaintiff, should be sustained.

Md.]

Argument of Counsel.

The bill clearly alleges, that because of the alleged non-age of said deceased, James Deegan, the will is inoperative and void; and, therefore, if said allegation of the plaintiff is error, then the plaintiff's complaint must fall.

1st. A male over fourteen years of age may make a valid will of personalty; no objection can be made to a will of personalty made by an infant over the age of fourteen, if made, merely from the want of age. *Hinkley on Testamentary Law*, 1878-88, sec. 19; *Dorsey's Testamentary Law*, Ch. 8, page 48; *Williams on Executors*, 6 Am. Ed., page 18, sec. 1, *et seq.*; 2 *Bl. Comm.*, 497 (Star page); 3 *Jarman on Wills*, page 748 (n.), 5th Am. Ed.

The common law rights on the subject in respect to the enjoyment of his property are not to be trenchd upon by a statute, unless such intention is shown by clear words or necessary implication. *Lewis Sutherland on Statutory Construction*, sec. 574; *Reg. v. Mall Union*, 12 Ir. C. L. (N. S.) 35.

2nd. A leasehold is a chattel real, and being less than a freehold is considered as personal estate or property, and is not included in land. In *Pistel v. Richardson*, 1 H. Bl. 26 (n.) a testator who was seized of freehold estates, and also possessed of two farms held by leases for a thousand years, gave, bequeathed and devised all and every his several messuages, lands tenements and hereditaments, whatever and wheresoever, which he was seized of, interested in, or entitled to, to his son for life with remainder over, and gave his personal estate to his wife and daughter; and LORD MANSFIELD, applying the first rule in *Rose v. Bartlett*, *Cro. Can.*, 292, that "if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only and not the lease for years," held that the two leasehold farms did not pass by the former devise. This case is referred to and adopted in *Taylor v. Taylor*, 47 Md. 295, 297.

A leasehold has always been considered personal estate, subject to all the rules governing that species of property, save in so far as those rules have been modified by express legislation. *Culbreth v. Smith*, 69 Md. 450, 453; *Arthur v. Cole*, 56 Md. 107; *Taylor v. Taylor*, 47 Md. 295, 297.

Under the term chattel is included every species of property, which is not of a freehold nature; and a lease for a term of years, while a chattel real, is but personal estate, though it be for a term of a thousand years; and it devolves, not on the heir, but on the personal representative of the deceased and is assets in his hands. *Devecmon v. Devecmon*, 43 Md. 335, 347.

It ought to be reasonably certain at this day that leasehold estate is personal estate. Leasehold is assets and goes to the executor or administrator. *Co. Lit.*, 111b; 1 *Lomas Dig.*, Tit. 7, Ch. 1, secs. 18, 19; 2 *Bl. Com.*, 144, 152; *Hewitt's case*, 2 Bl. 184; *Williams v. Holmes*, 9 Md. 287; *Guy's case*, 5 Mass. 417; *Reynolds v. Starke*, 5 Ohio, 204; 7 *Sm. & Marsh*, 479; *Neal v. Hagthorp*, 3 Bl. 561; *Barr v. Doe*, 6 Blackf. 335, 336.

At the common law leaseholds were classed as personalty: even though for some purposes the introduction of the action of ejectment led to the recognition of terms of years as estates in land, nevertheless, there was an important difference in the devolution of the estate on the death of the lessee; it descended to the executor or administrator of the deceased. *Digby, History of the Law of Real Property*, 1884, pages 143 *et seq.*, 145, 199.

The interest of a tenant of land for a term of years was reckoned among his chattels after his death, even if a term was to a man and his heirs. *Williams on Real Property*, 18 Ed., 20, 21.

A leaseholder has no seisen in the land, the possession of seisin in the land remaining still in him who hath the freehold. 2 *Bl. Comm.*, 144; *Stone v. Stone*, 1 R. I. 425, 428.

Md.]

Argument of Counsel.

Seisin makes the stock from which all future inheritance by right of blood must be derived. 2 *Bl. Comm.*, 209.

An estate for life, even if it be *pur autre vie*, is a freehold; but a leasehold for a thousand years is only a chattel and reckoned part of personal estate. 2 *Bl. Comm.*, 143; *Spangler v. Stanler*, 1 Md. Ch. D. 36; *Devecmon v. Devecmon*, 43 Md. 335, 347.

In England upon a *fi. fa.* against the goods and chattels of the debtor, a leasehold is liable to be seized and sold. *Barr v. Doe*, 6 Blackf. 335, 336.

Even if the leasehold were in the name of a wife, at common law it was the husband's property for execution. *Meni v. Rathbone*, 21 Ind. 454, 466.

Leaseholds are not included under the terms "land," "real estate" or "real property." *Meni v. Rathbone*, 21 Ind. 454, 467; *Devecmon v. Devecmon*, 43 Md. 335, 347.

But it has been held from the earliest period since the passage of the Statute of Frauds that the formalities prescribed by the fifth section for devises of lands and tenements do not apply to bequests of estates for years * * *; terms for years, *in esse*, being but chattel interests, may be bequeathed by any such will or testamentary paper as is sufficient to dispose of personal property; and in said case the Court holds that whatever may be thought of the reason or policy of the law upon the subject, it is quite clear that the terms of the statute do not include leasehold estates, the learned Judge, in the same opinion, finds that section 298 of Article 33 of the Code of 1860 (now Article 93, section 314 of the Code of 1884), is but the substantial embodiment of the Statute of Wills, as enlarged by the operation of the Statute 12, Car. 11, Ch. 24, together with the provision of the Statute of Frauds with respect to the power of devise of estate *per autre vie*; and that section 301 of the Code of 1860 (now section 317 of the Code of 1904) is almost a literal transcript of the 5th section of the Statute of Frauds prescribing the formalities for devises of lands and tenements.

PATTISON, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Baltimore County, sitting as a Court of Equity, sustaining the demurrer and dismissing the bill filed by the appellant against the appellee.

The bill alleges that on the first day of July, 1908, James Deegan died, leaving his aunt, Mary Holzman, the appellant, as his only heir at law, next of kin or distributee. That at the time of his death he was entitled to have distributed to him from the estate of his father, John Deegan, the leasehold interest in a lot of land located in Baltimore City, which, after his death, was on August 14th, 1908, by the administrator of his father, conveyed to J. Adolph Wager, executor of James Deegan, one of the appellees. That on the 7th day of July, 1908, a paper writing, dated the 8th day of April, 1908, purporting to be the last will and testament of James Deegan, was offered for probate in the Orphans' Court of Baltimore County and on the following day it was admitted to probate as the will of James Deegan, and letters testamentary thereon were granted to J. Adolph Wager, the person named therein as executor. That the paper writing is in the form of a will, signed and sealed by James Deegan and attested by three witnesses; and, omitting the formal conclusion, it is as follows, to wit:

"I, James Deegan, now residing in Highlandtown, Baltimore County, Maryland, being of sound and disposing memory and capable of executing a valid deed or contract, do make, publish and declare the following to be my last will and testament, hereby revoking all wills and testaments by me at any time heretofore made.

"To wit: Leasehold No. 1008 Potomac street, in Baltimore City, and all moneys in bank or banks belonging to me and having been deposited there by my guardian or his agent or all money which ought to have been deposited there, minus such amounts as I have received of late only.

Md.]

Opinion of the Court.

"All the aforesaid I will and bequeath absolutely to Mrs. Emma V. Harris in consideration of her raising me and taking the part of a mother. I hereby constitute Mr. J. Adolph Wager as executor of this my last will and testament."

The bill further alleges that at the time of the death of James Deegan he was a minor under the age of twenty-one years, having been born on the 21st day of July, 1889, and therefore charges that the said will is inoperative and void as to the bequest aforesaid to Mrs. Emma V. Harris. The bill also charges that at the time of filing the bill the said J. Adolph Wager, executor, had stated no account distributing the property, but she, the plaintiff, was apprehensive that he would state such an account distributing said property to the said Emma V. Harris, as he had said he would do.

The prayer upon this bill is:

First—That this Court will assume jurisdiction and administer said estate under its direction and control.

Second—That the said bequest of the leasehold property to Emma V. Harris be declared null and void.

Third—That J. Adolph Wager, executor, may be required to distribute the said leasehold property to the plaintiff, Mary Holzman, or if there be other personal representatives or heirs at law of the said James Deegan entitled thereto, then to such of them as may be so entitled.

Fourth—That the Court will construe the will of James Deegan.

Each of the defendants demurred to the bill and the Court below sustained the demurrers and dismissed the bill. It is from this order that this appeal is taken.

The question before us on this appeal is, whether the bequest to Emma V. Harris of the leasehold interest in a lot of land, mentioned in the paper writing purporting to be the will of James Deegan, was valid, he, the said James Deegan, having executed the same as his will when he was under

twenty-one years of age, to wit, about three months less than nineteen years of age?

It is contended by the appellant that under the statute law of this State no will is good and effectual to pass leasehold estate if the person making the same be a male under the full age of twenty-one years. In support of this contention we are referred to the Acts of 1798,, Chap. 101, Sub-Chap. 1, section 3, codified in the Code of 1904 as section 316 of Article 93, in which it is enacted: "That no will, testament or codicil shall be good and effectual to pass any interest or estate in lands, tenements, incorporeal hereditaments unless the person making the same, if a male, be of the full age of twenty-one years, and, if a female, of the full age of eighteen years."

We do not find that this question has ever been presented to and passed upon by this Court, although the right of a male, of sufficient discretion, under the age of twenty-one years and over the age of fourteen years, to dispose of his leasehold property has always been recognized and acted upon in this State (even since the passage of this statute). *Mr. Hinkley*, in his treatise on *Testamentary Law*, Chap. 1, under the caption or heading "Age and Residence of Testators," after setting out fully the section of the statute above set forth, proceeds at once with the discussion of it by saying: "The Code does not profess to prescribe a testamentary age for wills of *personal property*. Infants over the age of fourteen years, if males, and over twelve, if females, may make a will of personal property. No objection can be made to a will made by an infant, of the above age, merely for the want of age, if the testator had sufficient discretion. 1 *Williams' Ex.* 14; 2 *Blackstone's Com.* 497; 4 *Kent's Com.* 506; *Dorsey's Testamentary Law*, p. 48."

This author in the further discussion of this subject, in the 70th section of his work, says: "In the State of Maryland, especially in the City of Baltimore, there is a custom

Md.]

Opinion of the Court.

well known to all who have any occasion to deal in buying and selling land, or in preparing papers for its conveyance, to lease land for a long term of years, namely, for ninety-nine years, renewable forever, at a certain rent, usually equal to six *per cent.* interest on its value when leased. The interest of the landlord or lessee is called a fee simple interest, and is also commonly called a ground rent; but the interest of the tenant is not so called, but is a leasehold interest. The former is real estate and does not pass to administrators, but goes directly to the heirs without administration. * * * The latter is personal estate, and passes to the administrator."

This Court in the case of *Devecmon v. Devecmon*, 43 Md. 346, quoting from 2 *Kent's Com.* 242, said: "Under the term chattel is included every species of property which is not of a freehold nature; and a lease for a term of years, while a chattel real, is but personal estate, though it be for a term of a thousand years; and it devolves, not on the heir, but on the personal representatives of the deceased, and is assets in his hands."

In this State a leasehold has always been considered personal estate, subject to all the rules governing that species of property, save in so far as these rules have been modified by express legislation. *Culbreth, Admr., v. Smith*, 69 Md. 463; *Arthur v. Cole*, 107 Md. —; *Taylor v. Taylor*, 47 Md. 299. It is contended, however, by the appellant that this leasehold interest, if otherwise personal property, ceased to be personal property by reason of the operation of the Acts of 1900, Chap. 207, which gave to the lessee, after the expiration of ten years from the date of the lease, the option to purchase the fee in said land at an amount fixed by the statute. This operates only as an option extended to the lessee to buy the fee simple in the land. The character of the leasehold interest is not changed thereby and remains the same until the option is exercised. The lessee may never avail himself of this option, and until he does his interest in

the land remains unchanged and not enlarged and is a leasehold interest, which under the laws of this State is personal property in the hands of the administrator.

The contention is also made by the appellant that the determination of the question involved in this case is not dependent upon the fact whether the property sought to be disposed of by the will is real or personal property; that it may be personal property and yet be included within the class of property mentioned in the statute which can only pass by will when the person making it, if a male, be of the full age of twenty-one years, contending that even though a leasehold interest it is, nevertheless, "*an interest or estate in land.*" as described by the statute.

In the case of *Devecmon v. Devecmon*, *supra*, one of the questions the Court was called upon to determine was, "Whether the paper, being sufficient to pass personal estate, will pass leasehold estate, or whether leasehold estate is embraced by the terms of sections 298 and 301 of Article 93 of the Code, in regard to wills"? The Court there said: "It is contended for the appellant, that the terms of these sections of the statute, are comprehensive enough to embrace leasehold estates, and that the same reason and policy of the law that requires certain formalities to be observed in devises of freehold estates, equally apply to devises or bequests of leasehold estate. But whatever may be thought of the reason or policy of the law upon the subject, it is quite clear, we think, that the terms of the statute do not include leasehold estates, as those terms are defined and explained by Coke and Blackstone."

It is true that the language of the section of the statute to be construed in this case differs somewhat from the language in the section construed in the *Devecmon* case. The section in that case contained the words "lands, tenements and hereditaments," while the section before us reads, "any interest or estate in lands." Nevertheless, we think the reasons assigned by the Court in reaching the conclusion in that

Md.]

Opinion of the Court.

case apply to this case and will largely aid us in reaching our conclusion. In that case the Court said: "Terms for years, however, cannot be *created* by will, unless the instrument be executed with all the formalities required to pass real estate; because the interest, in right of which the testator creates the term, is real estate, and creating the term is a partial devise to it. *Co. Litt.*, Har. & B.'s Ed. 111, b, note 3; *Whitechurch v. Whitechurch*, 2 P. Wms. 236; *S. C.*, *Gilb. Rep. in Eq.* 168. But terms for years in *esse*, being but chattel interests, may be bequeathed by any such will or testamentary paper as is sufficient to dispose of personal property; and such, we think, has been the general understanding upon the subject."

The testator in this case held only a leasehold interest in the lands, a chattel interest, which had devolved upon him by administration upon his father's personal estate. He was not disposing of a leasehold interest *created by the will* out of the fee in the land held by him, the fee was in another, but by the will he was disposing of a leasehold interest which had *previously* been carved out of the fee simple estate.

The meaning of the language in this section, "no will, testament or codicil shall be good and effectual to pass any *interest or estate in lands*," does not, we think, prohibit the passing of a term for years in *esse*, the same being but a chattel interest, but is intended, and should be so construed, to prevent the passing of a term for years *created by the will* out of the lands of the testator, in right of which he creates the term, for in such case it is a partial devise of the real estate. This, we think, is the meaning of the statute. We are therefore of the opinion that the bequest to Emma V. Harris is a valid one.

In taking the view that we do as to the validity of the bequest, we deem it unnecessary to pass upon the question of jurisdiction. We therefore affirm the order of the lower Court.

Order affirmed, with costs to the appellees.

WM. F. LEITCH ET AL. vs. THOMAS LEITCH ET AL.

Devisee of Land May be Attesting Witness of the Will.

A devisee of land who is one of the attesting witnesses of the will is a competent witness to prove the will, and the devise to him is valid.

The provision of the statute of 25 George II, Ch. 2, formerly in force in Maryland, to the effect that a devise to an attesting witness shall be void, was repealed, because inconsistent with and omitted from, the Act of 1798, Ch. 101 (Code, Art. 93, sec. 317), providing merely that all devises of land shall be attested and subscribed in the presence of the testator by two or more credible witnesses, and under the Evidence Act of 1864, Ch. 109 (Code, Art. 35, sec. 1), which removes the disqualification of witnesses to testify on account of interest, a party who takes a benefit under a will is competent to prove it.

Decided January 12th, 1911.

Appeal from the Circuit Court for Anne Arundel County (BRASHEARS, J.).

The cause was argued before BOYD, C. J. BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

Robert Moss, for the appellants.

James W. Owens and *James M. Munroe*, for the appellee.

Md.]

Opinion of the Court.

BRISCOE, J., delivered the opinion of the Court.

The record in this case shows that Franklin Leitch of Anne Arundel County, died in the month of August, in the year 1909, leaving a last will and testament, which was on the 10th day of May, 1910, duly admitted to probate by the Orphans' Court of Anne Arundel County.

The testator never married, and left surviving him, as his heirs at law, three brothers, one sister, and several nephews and nieces, the children of a deceased brother.

By his will, he devised to his brother, Thomas Leitch, "the property known as 'Tracey's Farm,' consisting of a store, stock of goods and dwellings." To his brother, Manton Leitch "the property known as Town Point, consisting of house, store and stock of goods." To his sister, Mrs. Cunningham, his brother Wm. F. Leitch, and the heirs of his brother Columbus C. Leitch, he gave his "bank accounts" and "a balance of claim of Sam'l Leitch" to be equally divided between them.

Thomas Leitch, a brother, and Annie E. Leitch, are the two subscribing witnesses to the will, and it was upon their evidence, under oath, that the Orphans' Court of Anne Arundel County admitted the will to probate and decreed it to be the genuine last will and testament of Franklin Leitch, deceased.

The question for our determination on the record, is the validity or invalidity of the first clause of the will, which devised to Thomas Leitch the farm known and called "Tracey's farm," containing sixty-four acres of land more or less and improved by a store and dwellings.

This question is raised by a demurrer to a bill in equity, for a sale of this tract of land for purposes of partition, among the heirs at law, of the testator, and the bill avers, that Thomas Leitch, one of the devisees, being a witness to the will, the attempted devise to him of the real estate in question is absolutely null and void. In other words, it is

urged upon the part of the appellants, that because Thomas Leitch is an attesting witness and a beneficiary under the will, he can take no interest to the land under it by virtue of the Statute of 25 George II, Chapter 2, which is claimed to be in force in this State.

There can be no question that if this statute (25 George II) is in force here, that the devise in question would "be utterly null and void" because the statute so declares in express terms. It provides, that if any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, in the year 1752, to whom any beneficial devise, legacy, estate, interest * * * or affecting any real or personal estate other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate * * * shall so far only as concerns such person attesting the execution of such will or codicil or any person claiming under him, *be utterly null and void*; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act, notwithstanding such devise, legacy, estate, interest, gift, mentioned in such will or codicil." *Alexander British Statutes*, 781.

A legacy to a subscribing witness to a will or codicil of personalty is held to be good because a will of personalty did not require witnesses at that date. *Emanuel v. Constable*, 3 Russ. 436; *Foster v. Banbury*, 3 Sim. 40.

This statute was passed in 1752, but according to its provisions, did not go into effect, in any of "the Colonies or Plantations, in America," or apply to wills made before the first day of March, 1753. The title of the Act, is, "An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England and in his Majestys Colonies and Plantations in America."

No doubt can, then, be entertained, that this was the law of Maryland until the year 1798, when the General Assem-

Md.]

Opinion of the Court.

bly of Maryland, by Chapter 101 of the Acts of 1798, adopted and passed an entirely new system of laws and regulations concerning last wills and testaments, in lieu of and as a substitute for the existing laws and English statutes then in force, relating to wills.

This Act (Cap. 101, 1798), is in part, as follows: "An Act for amending and reducing into system the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons.

"Whereas the laws and regulations relative to the estates of deceased persons, comprehending a great variety of subjects, and interesting to citizens of every description not only have become complicated and difficult to be understood but are found by experience to be greatly inadequate to the purposes for which they were framed.

"Sec. 2. Be it enacted by the General Assembly of Maryland, that every provision, rule, or regulation, contained in any Act of Assembly heretofore passed or in any English statute, introduced, used or practised under in this State, which is inconsistent with or repugnant to anything contained in this Act be and it is hereby repealed and rendered utterly void and of no effect.

"Sec. 3. And be it enacted, that the following rules, orders and regulations, shall be taken, held and considered, in all Courts, tribunals and offices, and by all Judges, Justices and Officers in this State to be the law of the land.

"Sec. 4. All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same or by some other person in his presence, and by his express direction and shall be attested and subscribed in the presence of the said divisor by three or four credible witnesses or else they shall be utterly void and of no effect."

Now it appears, by section 309, of Article 93, of the Code of 1860, title testamentary law that every last will and

testament executed in due form of law after the 1st day of June, 1850, should pass all the real estate which the testator had at the time of his death and this section is now section 329 of Article 93 of the Code of 1904.

Sec. 4 (*supra*) of the Acts of 1798, will be found in *totidem verbis* in the Codes of 1860, 1878, 1888, and is now codified as section 317 of Article 93 of the Code of 1904, and provides, that all devises of lands, etc., shall be attested and subscribed in the presence of the devisor by two or more credible witnesses or else they shall be utterly void and of none effect, the only change being in the number of witnesses and its application to both real and personal property. The Codes of 1860 and 1888 were adopted in lieu of and as a substitute for all the Public General Laws then in force in the State.

The legal requirements for a valid will to pass real estate in Maryland and the restrictions thereon, now in force, are clearly set out in Article 93, sections 314 to 329 of the Code of Public General Laws (1904) and need not be referred to here, except to say, that there is nothing in any of their requirements, formalities or restrictions to the effect, that an attesting witness cannot be a beneficiary under a will. If the Legislature of Maryland had intended at anytime to have imposed this restriction upon devises to attesting witnesses, it would have so provided in express terms or specially declared by the Act of 1798, Chapter 101, that this restriction should continue to be in force and effect, in this State, as provided by 25 George II, Ch. 6.

But apart from this, we think, the Act of 1864, Chapter 109, commonly called the Evidence Act, is a complete answer to the appellant's contention, in this case, because, under this Act a party who takes an interest under a will is clearly competent to prove it.

In *Estep v. Morris*, 38 Md. 417, it was said: "But most of the disabilities imposed by the common law, have been removed by the Act of 1864, Chapter 109, and especially has

Md.]

Opinion of the Court.

incompetency on account of interest been swept away. Unless that Act excepts from its operation witnesses to wills, we think it clear that parties who take an interest under a will are competent witnesses to prove it. That Act provides, that "No person offered as a witness, shall hereafter be excluded by reason of incapacity from crime, or interest, from giving evidence, either in person or by deposition, according to the practice of the Courts, in the trial of any issue joined or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any Court, or before any judge, jury, justice of the peace, or other person, having by law or by consent of parties, authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offering as a witness," etc. The Court, further said, in dealing with this question, the only objection urged to the validity of this will, is that Morris was an incompetent witness, he having been named by the will executor and guardian. Persons offering as witnesses in such a "proceeding" or "inquiry" are by the very terms of the Act made competent, notwithstanding they may be interested in establishing the will. Parties having an interest may also, by the express terms of the Act of 1864, testify "on the trial of any issue." If competent to testify on the trial of such issues in the Court, can it be consistently held that they are incompetent to testify in the Orphans' Court, or that they were not competent subscribing witnesses to the will at the time of its execution? We think it clear, that at common law, there could be no incompetency of subscribing witnesses to wills at the time of attestation on account of interest in or under the will, but that persons who took an interest under the will, were incompetent to prove the will after the death of

the testator, solely because they were interested in establishing the will, at the time they offered to testify, and *that all incompetency by reason of such interest, has been removed by the Act of 1864, Ch. 109.*

It was also urged in that case, that no persons, except those who are disinterested should be permitted to be subscribing witnesses to wills, and this was answered by the statement, that neither LORD MANSFIELD nor JUDGE CHASE supposed that much danger from imposition or fraud, could result from permitting legatees to be attesting witnesses. But be this as it may, we have no power to alter or modify the law, our sole duty being to administer it as we find it upon the statute.

In *Harris v. Pue*, 39 Md. 535, it was also held, that under the Act of 1864, Ch. 109, a beneficiary under a will is a legal and competent witness to sustain it, as decided in *Estep v. Morris*, *supra*, and that the latter decision was the necessary result of the broad and comprehensive terms of the Act of 1864, Ch. 109.

In *Hammett v. Shanks*, 41 Md. 201, this Court, fully approved the decision in *Estep v. Morris*, and *Harris v. Pue*, *supra*, and held, that under the Acts of 1864, and 1868, a party who takes an interest under a will, has been made a legal and competent witness to prove it.

Mr. Hinkley, in his excellent work on *Testamentary Law*, treats the case of *Estep v. Morris*, *supra*, as controlling upon this question, in this State. He says, in section 71 of Chapter 5, page 42, one who is the executor of a will, and also guardian thereunder of the infant devisee is competent to attest the will and to prove it, in the Orphans' Court, his incompetency at common law, to prove the will by reason of his interest therein having been removed by the Act of 1864. Chapter 109. By the Act of 1864, Chapter 109, a party who takes an interest under a will is a competent witness to prove it. And in *Higgins v. Carlton*, 28 Md. 140, it was

Md.]

Opinion of the Court.

held, that credible as used in the statute means competent to testify at the time of attestation.

In *A. & E. Ency. of Law*, 2nd ed., Vol. 18, page 739, it is said, in some States legislation has rendered devisees and legatees competent witnesses and gifts to them as valid, and states, this appears to be the rule in Maryland.

In *29 A. & E. Ency. of Law*, 1st ed., pages 233 and 234, it is said: In many of the States the common law disqualification of witnesses generally on the ground of interest has been removed, but by express exclusion of statute the law as regards attesting witnesses is allowed to remain unchanged. But by statute in Maryland a person interested, is not an incompetent witness to a will.

The case of *Elliott v. Brent*, 6th Mackey, 103, relied upon by the appellant, cannot be regarded as controlling, in the light of our own decisions to the contrary upon the construction of our Maryland statutes. That case was decided by the Supreme Court of the District of Columbia, in passing upon the effect of one of the Revised Statutes of the District of Columbia upon the provisions of the Statute of 25 George II, and has no relation to the construction of our own statutes.

We hold, then, under our Maryland law and the settled practice in this State, that a beneficial devisee is a competent witness to prove a will under which he takes an interest, and that a devise of real estate, such as was made in this case, to an attesting witness, is valid and operative. That the clause in the Statute of 25 George II, Ch. 6, in so far as it invalidates devises and legacies to attesting witnesses to wills of realty, and declares they shall be utterly null and void, is not in force in this State, because it has been annulled and superseded by the Act of 1798, Ch. 101, and by the Act of 1864, Ch. 109, both of which Acts have been adopted and codified as part of the Code of Public General Laws of the State, as Article 93, section 314, title "Wills,"

and Article 35, section 1, title "Competency of Witnesses." *Erb v. Grimes*, 94 Md. 92; *Montell v. Con. Coal Co.*, 39 Md. 164; *State v. Falkenham*, 73 Md. 463; *Alexander v. Mayor & C. C.*, 53 Md. 104; *State v. Northern C. R. R.*, 44 Md. 167; *State v. Yewell*, 63 Md. 120.

The devise to Thomas Leitch, in this case, being valid, the defendants' demurrer to the plaintiffs' bill was properly sustained and the bill must be dismissed.

Order affirmed and bill dismissed with costs.

DICKSON & TWEEDDALE vs. WILLIAM E.
FOWLER.

*Action on Note Given for Services in Securing Options on
Shares of Stock—Original Contract Waived—Considera-
tion—Duress—Admissibility of Evidence—Fraud.*

Defendants, being desirous of obtaining the controlling interest in the stock of an insurance company, made a contract with the plaintiff by which the latter agreed to secure options on the greater part of the stock at \$15 per share, which were to be taken up by the defendants. The contract did not provide expressly for any payment to the plaintiff for his services, but the parties expected at the time that the plaintiff would be able to get fifty-one per cent. of the stock of the company for about \$12.00 per share, and would be compensated by being paid the difference between that sum and \$15 per share, which was to be paid by the defendants. Afterwards, the plaintiff found himself unable to secure the stock at that price, but was obliged to pay \$15 a share for the options in addition to a commission of brokers. The defendants participated in this new arrangement, but did not take up all the options, and in other respects the original

Md.]

Syllabus.

contract was changed. Before defendants had acquired the full amount of stock necessary for the control of the company, the plaintiff demanded compensation for his services and threatened to turn over his own shares of stock to the opposing faction in the company. Defendants agreed to pay \$7,000, part of which was paid in cash and a note given for the balance, upon which the action in this case was brought. Defendants alleged that the note was procured by fraud and by duress, and also that it was without consideration. *Held*, that the evidence does not show that the defendants were misled by any false representations of fact made by the plaintiff at the time the note was given to him.

Held, further, that the promise to pay the plaintiff for his services in obtaining the options was not without consideration, since, when he found that the stock could not be procured at the price estimated at the time the original contract was made, he had a right to refuse to perform further services unless the defendants would pay for the same, and the evidence shows that the note was given for services to be thereafter rendered by the plaintiff in securing control of the company for the defendants.

Held, further, that the fact that the defendants feared that unless they agreed to give the note, the plaintiff would not transfer to them the shares of stock he himself owned, and would not pay a debt due to the corporation in question by a third party, which debt the plaintiff had guaranteed, did not constitute duress or undue influence.

A contract is not voidable for duress because the promisee threatened not to carry out another contract with the promisor unless it was made.

In an action to recover for services rendered in obtaining for the defendants the controlling interest in the stock of an insurance company, the evidence as to the States in which that company did business, or as to what services the plaintiff rendered to another company, is irrelevant.

In such action, the admission of evidence as to what contracts were made by the company after the defendants obtained control of it is not prejudicial error.

A witness cannot be allowed to state his opinion as to the true construction of a written contract.

Letters written by a party to a cause which are mere *ex parte* statements in his own interest are not admissible in evidence.

In an action to recover for services rendered by the plaintiff, evidence is admissible to show that the original contract relating to such services was abandoned and that they were rendered in pursuance of another agreement.

When the defendant alleges that the promissory note sued on was obtained by fraud, a letter from the defendant to the plaintiff, written after the transaction in question, expressing confidence in the plaintiff, is admissible in evidence.

Decided January 10th, 1911.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

George A. Finch (with whom was *Jas. A. Fechtig, Jr.*, on the brief), for the appellants.

W. Calvin Chesnut and *Charles Markell* (with whom were *Gans & Haman* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

This is a suit on the following promissory note of the appellants in favor of the appellee, which was filed with the declaration in the Court below:

Md.]

Opinion of the Court.

"5,000.00.

Jan. 5, 1908.

"Four months after date, we promise to pay to the order of Wm. E. Fowler, Five Thousand Dollars, at The First Nat. Bank of Baltimore, Md.

"Value received with 6% interest.

"DICKSON & TWEEDDALE."

In addition to the general issue plea, the defendants filed special pleas in which they charged, first, that the note "was procured by the fraud of the plaintiff," and, secondly, that the note "was procured by the fraudulent representations of the plaintiff." These special pleas were traversed by the plaintiff, and the case was tried on issues joined on the general issue plea and on the replications to the special pleas. At the trial the plaintiff offered in evidence the note sued on and rested his case, and the defendants then offered evidence in support of their pleas. During the trial the defendants reserved forty-four exceptions to the rulings of the Court on the evidence, but in the view we take of the case it will not be necessary to pass on these exceptions separately. At the conclusion of the testimony offered on behalf of the defendants, the plaintiff filed two motions to strike out certain evidence, and offered four prayers, the defendants objected to the motions and prayers being received at that time, but the Court overruled the objection, and the forty-fifth exception is to this ruling of the Court. The Court below then stated that he refused the motion to strike out the evidence, and that it was for the plaintiff to say whether he desired to offer any evidence, to which the plaintiff replied that he submitted on the prayers, when the Court further stated that as the plaintiff did not desire to offer evidence, he would ask for the prayers of the defendant. The defendants then offered seven prayers and filed a special exception to plaintiff's fourth prayer, and the forty-sixth exception is to the rejection of the defendants' prayers, the overruling of the special exception to plaintiff's fourth prayer, and to the

granting of the prayers of the plaintiff, instructing the jury, (1) that "there is no evidence legally sufficient to show that the note was procured by fraud;" (2) that "there is no evidence legally sufficient to show that the note was procured by duress;" (3) that "there is no evidence legally sufficient to show lack or failure of consideration for the note;" and (4) "that it is admitted by the pleadings and the testimony of the defendant Tweeddale that the note sued on was executed by the defendants and was delivered to the plaintiff, and that there being no evidence legally sufficient to establish any defense to said note, the verdict of the jury should be for the plaintiff for the sum of \$5,000.00 with interest at six per cent., from January 5, 1909, to date."

The defenses relied on by the appellants are fraud, duress and want of consideration; the contention of the appellants. in regard to the last defense, being that the note was given for services which the appellee was bound to perform under a previous contract with the appellants. After a careful consideration of the evidence, which covers over a hundred pages of the printed record, we think it fails to establish either of these defenses.

William E. Fowler, of Baltimore City, the appellee, who was an agent of and largely interested in the German Union Insurance Company, and who was dissatisfied with its management and apprehensive of a depreciation of the stock because of its inefficiency, went to New York in August, 1908. to arrange with the appellants, Robert Dickson, Robert D. Tweeddale and George N. Thomson, co-partners trading as Dickson & Tweeddale, for the purchase by the appellants of a controlling interest in said company. As the result of the negotiation, the appellee and the appellants entered into the following contract, which was signed by the appellants and appellee but not sealed:

"This agreement made this 21st day of August, 1908, by and between Robert Dickson, George N. Thomson and Rob-

Md.]

Opinion of the Court.

ert Dickson Tweeddale, doing business in the city of New York under the firm name and style of Dickson & Tweeddale, parties of the first part and W. E. Fowler of Baltimore, Maryland, party of the second part witnesseth that:

"Whereas the party of the second part is a large stockholder in the German-Union Insurance Company of Baltimore, and the parties of the first part are desirous of acquiring an interest as stockholders in that company. Now, therefore, in consideration of the premises and of the sum of one dollar (\$1.00) lawful money of the United States and other good and valuable consideration by each of the parties hereto to the other in hand paid, the receipt of which is hereby mutually acknowledged and further in consideration of the covenants and conditions hereinafter contained, it is agreed by and between the parties hereto as follows:

"1. The party of the first part shall forthwith endeavor to secure options for the purchase of at least (51%) fifty-one per cent of the capital stock of the German-Union Insurance Company of Baltimore at (\$15.00) fifteen dollars per share; said options are to be taken in the name of George N. Thomson of Larchmont, New York, and to be treated as hereinafter provided.

"2. The party of the second part shall hold or control the voting power of at least thirty-seven hundred and fifty (3,750) shares of the stock of said company so secured under said options; such ownership to be continued as hereinafter provided, the balance of the said stock so secured on the said options to be taken by the parties of the first part as hereinafter provided.

"3. The said options shall be secured by the party of the second part within sixty (60) days of the date of the execution of this agreement; said options, when obtained, to be deposited with the Baltimore Trust & Guaranty Company of Baltimore, or the First National Bank of Baltimore, or the Drovers & Mechanics National Bank of Baltimore; and the parties of the first part on being notified in writing by

the party of the second part that options on the required number of shares have been secured, shall name a date on which payment for their portion of said stock shall be made, which shall be within fifteen days thereafter unless the condition of the money market in New York City is abnormal."

By the fourth paragraph of the contract, the parties agreed that "If these aforesaid options be exercised by the parties hereto, and the control of the said German-Union Insurance Company be thereby acquired by them," they would forthwith execute an agreement that neither party should dispose of his or their stock within certain periods without the consent of the other, without the stock having been first offered to the other party at its book value. The other paragraphs of the contract provided for a change of the domicile of the company, for the appointment of general agents, etc.

The contract makes no provision for payment for the services to be rendered by the appellee in securing the options on the fifty-one per cent. of the stock, but it appears from the testimony of Mr. Dickson and Mr. Tweeddale that the matter was fully discussed during the negotiations leading up to the execution of the contract; that the appellee stated that he would be able to secure the options at \$12.00 or \$12.50, and that they agreed that the appellants should take the stock at \$15.00 per share, and that the appellee should receive the difference for his services in securing the options. And Mr. F. Williard Smith, who was an employe of the appellants, was present during most of the conversations between the appellants and the appellee prior to the execution of the contract of August 21, 1908, and who represented the appellants from the 15th of October to the 30th of November in the subsequent transactions in Baltimore looking to securing the control of the company, when asked by appellants' counsel if he had "ever heard of any arrangement to pay Mr. Fowler any compensation by way of money for his services or for any services," said: "I was under the impression that Mr. Fowler's remuneration was to

Md.]

Opinion of the Court.

consist principally of general agency appointments for the German-Union Company and for other companies then controlled by Dickson & Tweeddale. The question of money payment was to my mind more or less open to be dealt with according to developments." In answer to the further question: "Was there any amount stipulated for as for services?" He replied: "At the time the agreement was drawn up there was some conversation about a cash payment, but I do not think any amount was definitely decided on." It is therefore, apparent that at the time the contract was executed, it was understood that the appellee was to receive something for his services in securing the options in addition to the general agency appointments provided for in the written contract.

Mr. Tweeddale states that after the execution of the contract of August 21st, Mr. Fowler advised the appellants from time to time that he was proceeding under the contract; that about October 1st Mr. Fowler telephoned him to come to Baltimore; that when he reached Baltimore, Mr. Fowler informed him that he had been endeavoring to secure the options and had employed Wm. A. Reed & Company, brokers, to assist him; that they had tried to secure the options at less than \$15.00 per share, but had been unable to do so, and that it would be necessary to pay in addition to the \$15.00 per share "a brokerage of one-eighth of one per cent.," and that Mr. Fowler then introduced him to Mr. Wm. Crawford, of the firm of Wm. A. Reed & Company, and that Mr. Crawford then proceeded to assist Mr. Fowler in securing the options. Mr. Smith states that he was sent to Baltimore about the middle of October to represent the appellants in taking over the stock of the German-Union Insurance Company that had been arranged for; that it was then understood that sufficient options had been lodged with Wm. A. Reed & Co. to warrant the appellants "to go ahead with the purchase, and arrangements had been made for the day following" his "arrival for several of the principal directors

to turn in their stock to Reed & Co. and receive payment therefor;" that the Southern Insurance Company advanced \$80,000.00 for this purchase; that shortly after this purchase, he took up with Mr. Fowler the matter of the stock which he was to control and discovered that some of it was hypothecated and some of it was held by Mr. Fowler's agents, and that he advised the appellant that he "did not think that Mr. Fowler could procure the voting power on the amount of stock originally stated in the contract and suggested they make some re-arrangement with him," and that he thinks in view of this development an arrangement was made between the appellants and the appellee whereby the latter agreed to relinquish a certain share of the general agency territory which he was to have had under the original contract. It further appears from the testimony of Mr. Tweeddale that by the 20th of October, that is, within the sixty days, with the stock that had been purchased, they had secured options on fifty-one per cent. of the stock; and that stock to the value of \$75,000.00 was purchased by the Southern Insurance Company. It further appears that all of the options and shares of stock had been secured through the efforts of Wm. A. Reed & Co. and Mr. Fowler; that Mr. Fowler "did not profit" by any of the transactions; that he and Reed & Co. continued, at the request of the appellants, to secure options until about the 1st of November, some of which the appellants took up through Reed & Co. and some they never took up at all; that as late as December 5th the appellants wrote Mr. Fowler requesting him to secure one hundred shares more of the stock; that the failure of the appellants to take up all of the options was not due to the condition of the money market, and that after the appellants got control of the company, they did not enter into the agreement referred to in the fourth paragraph of the contract of August 21.

The testimony relied on by the appellants is the following testimony of Mr. Tweeddale, who, after stating that he came to Baltimore about the 7th of October, says: "Some few days

Md.]

Opinion of the Court.

subsequent to that time, Mr. Fowler invited me to his room one evening and informed me he had been offered a sum of money by the opposing faction in the German-Union Fire Insurance Company to turn the stock that he owned or controlled to them and thereby defeat us in our attempt to get control. He said he told them he would give them an answer the next day. He stated that they had offered him \$18,000.00 and to take his stock at \$15.00 per share. He asked me what it was worth to us. I told him we were paying \$15.00 a share, the figure specified in the contract, which was all the stock was worth and that was all that we would pay." Mr. Tweeddale states that several days later, he sent to New York for Mr. Willard Smith, and then says: "After Mr. Smith arrived, I decided to return to New York and leave him in charge. I was in Mr. Fowler's room a day or two before I was leaving for New York, possibly the day before. I cannot fix the date of this transaction, I am now speaking of definitely, I should say around October 20th. I was in Mr. Fowler's room in the Hotel Rennert, with Mr. Fowler, Mr. Willard Smith and Mr. Grant Stockham. About eleven o'clock that evening I left the room, and Mr. Fowler followed me to the elevator, and when I was standing at the elevator he told me, he asked me when I would return from New York. I told him I would return in a day or two, in two or three days, anyway. He told me he wanted me to bring back with me \$10,000 and that he wanted the money, that he didn't want any check. I asked him, what for? He said, well, if you don't the deal is all off, and I will sell my stock to the other side. I said, why didn't you tell me this before. If you had made this demand of me sometime back I would simply have returned to New York and called the deal off. But, I said, you have taken me by the throat. You know I have put out a large amount of money. You know that I cannot go backwards. And I suppose that is why you make the demand you do at this time. But, I said, I have a

contract with you, and we are going to live up to that contract. He said, that is only a gentleman's agreement. I said, you won't get ten cents. Mr. Fowler said he was going to faint, and leaned up against the wall, and attempted to lie down on the hall floor of the hotel. I assisted him to his room, and Mr. Willard Smith and Mr. Grant Stockham got some ice water, and put him on the bed, and I left the room and returned to New York the next day or the day following. * * * I returned to Baltimore several days later, possibly two or three days later, and the subject of this demand was again mentioned, was again brought up, and I informed Mr. Fowler that if he would stand by his agreement, live up to it, that Dickson and Tweeddale would give him \$7,000.00, which he said was perfectly acceptable." It further appears from the testimony of Mr. Tweeddale, that the appellants paid Mr. Fowler \$1,000.00 on account of the \$7,000.00 he promised to pay him about the last of October, and that this payment was made through Mr. Smith who took from Mr. Fowler the following receipt: "Received of Dickson & Tweeddale \$1,000.00 on account, balance of \$5,000.00 to be paid on completion of arrangements;" that Mr. Smith explained to him, Mr. Tweeddale, that he wrote the receipt showing only a balance of \$5,000.00 due, with the view of trying to save the appellants \$1,000.00 in the transaction; that Mr. Smith, so far as he was concerned or knew, was not authorized to do that; that he did not know that Mr. Smith was going to try to cut down the claim from \$7,000.00 to \$6,000.00, and that when he heard that he had tried to do it, he repudiated it, and said that he was going to stand by his original agreement with Mr. Fowler and pay him \$7,000.00, and that he made the same statement to Mr. Fowler when he mentioned the matter to him; that the annual stockholders' meeting was held on January 2, 1909; that he was made President of the company; that the nominees of the appellants were elected as a Board of Directors, and that the appellants were made the general agents of the company; that on the after-

Md.]

Opinion of the Court.

noon of January 5, 1909, just as he was leaving the office to go to New York, Mr. Fowler stopped him and presented two notes, one for \$1,000.00, at four days, and the other the note sued on, to cover the balance of the \$7,000.00 still due him, and said that while they knew what the understanding of the matter was, if anything should happen to Mr. Tweeddale, he would have no evidence of what occurred, and that he would like to have the notes signed, and that he, Mr. Tweeddale, signed them; that between the time he promised to pay Mr. Fowler the \$7,000.00 and the time he gave the note, he was in Baltimore a number of times; that every time he came, he saw Mr. Fowler and advised and conferred with him in regard to completing the purchase of the company; that Mr. Fowler assisted him in that, advised him as to it, and "very much planned the campaign, and was very active during the whole time; that he wrote Mr. Fowler on Dec. 5th to secure for the appellants one hundred shares more of the stock of the company, and that he wrote him the letter of December 11th, in which he stated that he was not clear that they were prepared to give the minority any representation on the Board, but that he would talk it over with Mr. Fowler before the meeting; that he would "positively oppose placing any of their number on either the Finance or the Executive Committee. Our present plan is not to have any one on the last two named committees except your good self and possibly Mr. Wilcox and ourselves. Hoping to have the pleasure of seeing you next week, and with kindest personal regards. I am," etc.

The statements of Mr. Tweeddale in regard to what occurred after his promise to pay Mr. Fowler \$7,000.00, and his subsequent dealings and relations with Mr. Fowler are hardly consistent with his testimony as to what occurred when Mr. Fowler made the demand upon him. But apart from the inherent weakness of such evidence, it fails to establish a want of consideration for the note, or that it was pro-

cured by duress. As we have said, the evidence shows that when the contract of August 21st was made, accepting the statements of Mr. Dickson and Mr. Tweeddale, it was understood by the appellants and the appellee that the latter was to be paid for his services in securing options on the stock; that he would be able to secure the options at from \$12.00 to \$12.50 per share, and that he would receive as compensation for such services the difference between the \$12.00 or \$12.50 per share and \$15.00 per share which the appellants agreed to pay for the stock. The evidence further shows that when the appellee attempted to secure the options, he discovered that they could not be obtained at less than \$15.00 per share, and that in order to get them at that price it would be necessary to procure the assistance of a broker at an additional cost of one-eighth of one per cent.; that he promptly notified the appellants of the fact; that through the extraordinary and united efforts of the appellee and the broker, and after encountering and overcoming unforeseen difficulties, growing largely out of the fact that a number of the stockholders believed that the appellants desired to secure control of the company for the purpose of merging it with the Southern Insurance Company which was thought to be financially embarrassed, they finally succeeded in securing a large number of options; that instead of receiving for such services, as was contemplated by the appellants and appellee, between \$15,000.00 and \$19,000.00, the appellee, at the time he made the alleged demand upon the appellant, had not received anything for his services. The evidence to which we have already referred, further shows, we think, that at the time Mr. Tweeddale promised to pay the appellant the \$7,000.00, the contract of August 21st had been abandoned by the parties. The options had not been taken in the name of George Thomson; they had not been "exercised" by the appellants, but a large amount of the stock on which options were secured had been purchased by the Southern Insurance Company instead;

Md.]

Opinion of the Court.

it was known and understood by the appellants and the appellee that the latter could not, as he expected to do, then control the voting power of 3,750 shares of stock, and the evidence of what subsequently transpired shows that other features of the original contract were entirely ignored. Assuming, then, that the appellee refused to continue the performance of a contract which, by reason of unforeseen difficulties, involved a loss to him of from \$15,000.00 to \$19,000.00, unless the appellant made some provision for his services, we think the case is covered by the principle recognized in *Linz v. Schuck*, 106 Md. 220, where a contractor engaged to do certain work, and after a part performance of the contract refused to go on with the work because of substantial and unforeseen difficulties which increased the cost of performance of the contract, and the other party promised to pay an additional sum if the contractor would complete the work, and where the Court held that there was a sufficient consideration to support the promise to pay the additional sum. See also 9 *Cyc.* 352.

But there is another aspect of the case. If, as stated by Mr. Tweeddale, a sufficient number of options had been secured on the 20th of October to give the appellants control of the company (about which there seems to be some doubt in view of the evidence to the effect that the appellee and the broker continued after that time and until sometime in December to secure options and stock, and that when the meeting of the stockholders was held on January 2nd, the appellants and the appellee had just enough stock to control), then the appellee, under the contract of August 21st, had no further duty to perform with reference to securing further options or stock, and the only reasonable construction of the agreement between Mr. Tweeddale and the appellee relative to the payment of the \$7,000.00, which was made several days after October 20th, in the light of the evidence of what was subsequently done, and the part that they had in it,

which shows that the plan of the appellants to secure control of the company met with persistent, determined and bitter opposition, and that it was only through the combined and continued efforts of the appellee, the broker and Mr. Smith, that control was finally accomplished, is that the \$7,000.00 was to be paid to the appellee for services to be thereafter rendered in connection with securing control of the company. Certainly these services were rendered upon the faith of the promise to pay the \$7,000.00, and Mr. Tweeddale accepted them with that understanding, and knowing that the appellee was otherwise under no obligation to perform them. So that in either view of the evidence, there was sufficient consideration to support the promise to pay the \$7,000.00 for part of which the note in suit was given.

In regard to the defense of duress, it is only necessary to say that at the time the appellee made the only threat he is said to have made, Mr. Tweeddale said to him in reply "You won't get ten cents," and that at the time he promised to pay the \$7,000.00, and at the time the note was signed, no threats whatever were made. *Gotwalt v. Neal*, 25 Md. 434; 9 Cyc. 431 and 443. The fact that the appellee held one thousand shares of the stock, and the fact that he had guaranteed the payment of a debt due by the company of which he was president to the German-Union Insurance Co., and the further fact that Mr. Tweeddale was apprehensive that if he did not promise to pay him \$7,000.00, and did not sign the note, the appellee would not pay the debt of his company, and would sometime in the future surrender his stock to the opposing faction of the stockholders, are not sufficient to show that the note was procured by duress.

In support of the defense of fraud, the appellants rely upon evidence of statements made by the appellee prior to the execution of the contract of August 21st, that he owned or controlled a certain amount of the stock of the German-Union Insurance Company. But assuming that there is evi-

Md.]

Opinion of the Court.

dence in the case to show that these statements were at the time untrue, the promise to pay the \$7,000.00 was another and different undertaking, and the evidence shows conclusively that the appellants knew, at the time Mr. Tweeddale made the promise to pay the \$7,000.00, that the appellee could not control the number of shares he originally expected to control, and that they knew at the time the note was given, that he controlled only one thousand shares of the stock. Under such circumstances the note cannot be said to have been procured by fraudulent representations.

It follows from what has been said, that there was no error in the granting of the first, second and third prayers of the plaintiff, and as the execution and delivery of the note were admitted by the pleadings and by Mr. Tweeddale, we see no objections to the plaintiff's fourth prayer. In regard to the forty-fifth exception, we need only say that the statements of the Court below, to which we have already referred, show that the prayers were not disposed of until after the plaintiff declined to offer any evidence in rebuttal.

The 1st, 2nd, 3rd, 4th, 4½, 5th, 6th, 10th, 11th, 12th, 16th, 19th, 20th, 22nd, 23rd and 37th exceptions have been abandoned by the appellants.

The 7th and 8th exceptions are to the refusal of the Court below to allow the witness to state in what States the German-Union Insurance Co. was entitled to do business, and the 9th exception is to the rejection of the evidence to show "what act" the appellee "performed" for the Southern Insurance Co. This evidence could not in any way have reflected upon the issues in the case and was properly excluded.

There was no error in the refusal of the Court below to allow Mr. Tweeddale to construe the contract of August 21st and to state what services the appellee performed other than those required by said contract, which is the subject of the 13th exception.

The 14th exception is to the rejection of two letters from the appellee to the appellants in regard to the business of the Southern Insurance Co. and the Guardian Fire Insurance Company, which do not reflect upon the questions involved in this case and were not admissible, and for the same reason, and the further reason that the appellants cannot establish their defense by their own unsworn statements, the letter referred to in the 15th exception was properly excluded.

The 17th and 18th exceptions are to the rulings of the Court below allowing Mr. Tweeddale to state on cross-examination what contract he obtained from the German-Union Insurance Co. after he secured control of the company, and if the evidence was not strictly relevant, the appellants were not, in the view we have taken of the case, prejudiced by its admission.

We see no objection to the evidence referred to in the 21st, 24th, 26th, 27th, 29th and 31st exceptions, which tended to show that the appellants did not take up the options secured by the appellee; the opposition the appellee encountered in his efforts to secure control of the company for the appellants, and that the stock was purchased by the Southern Insurance Company, and was offered for the purpose of showing that the original contract was abandoned by the parties, and the character and extent of the services rendered by the appellee.

The appellants were not injured by the admission of evidence showing that the Southern Insurance Company and the Guardian Fire Insurance Company went into the hands of receivers, referred to in the 25th and 28th exceptions, nor were they prejudiced by the answer of the witness to the question objected to in the 30th exception, which stated that he did not make the statement referred to in the question.

In answer to the question objected to in the 32d exception, the witness stated that the stock purchased by the

Md.]

Opinion of the Court.

Southern Insurance Company was subsequently taken up by the appellants, hence they were not prejudiced by the answer.

The 33d exception is to the admission of a letter from Mr. Tweeddale to the appellee, expressing his confidence in the appellee, which was admissible as reflecting upon the accuracy of his previous statements in the case that the appellee had defrauded him.

The letter referred to in the 34th and 35th exceptions, from Charles Godchaux to Mr. Dickson, dated May 6th, 1909, stating that Mr. Dickson had been honest, etc., in his dealings with the Southern Insurance Company, was clearly inadmissible, and there was no reversible error in excluding the evidence referred to in the 36th exception, as it had already been shown that there was organized opposition on the part of the stockholders to the efforts of the appellants to secure control of the German-Union Insurance Co.

The 38th, 39th, 40th, 41st and 42nd exceptions are to the rejection of evidence to show who were the stockholders of the German-Union Insurance Co. on August 21st, and are disposed of by what we have already said in reference to the defense that the note was procured by fraudulent representations.

The remaining exceptions, the 43rd and 44th, are to the admission of evidence to show that the appellants did not take up all the options secured by the appellee, which was admissible as tending to show that the parties had previously abandoned the original contract.

Finding no reversible error in any of the rulings of the Court below, the judgment appealed from will be affirmed.

Judgment affirmed with costs.

WILLIAM T. TOWNES vs. JOHN CHENEY.

Contract to Pay Made on Condition Not Fulfilled—No Recovery Under Quantum Meruit When Special Contract Not Performed and Not Waived or Broken by Defendant.

Plaintiff, who had a contract for the services of a jockey in riding his race horses during certain years, transferred the contract and the right to the services of the jockey to the defendant under an agreement which provided as conditions of its efficacy that the jockey's father should consent to the transfer and that it should also be approved by a Jockey Club. In consideration of the transfer, defendant gave to plaintiff a promissory note for \$500. In an action on the note, *held*, that since the father of the jockey had refused his assent to the transfer and it had not been approved by a Jockey Club, the plaintiff is not entitled to recover.

Held, further, that the plaintiff is not entitled to recover on a *quantum meruit* for two months' services rendered by the jockey to defendant, since the special contract sued on had not been performed, or abandoned by the parties, or its performance prevented by the defendant.

Decided January 12th, 1911.

Appeal from the Circuit Court for Baltimore County (DUNCAN, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and UENER, JJ.

A. P. Shanklin and Alex. Preston (with whom was Carter Lee Bowie on the brief), for the appellant.

Md.]

Opinion of the Court.

Z. Howard Isaac (with whom were *Jas. Fluegel* and *G. G. Wilson* on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

This case originated in a non-resident attachment brought by the appellee against the appellant, the alleged evidence of indebtedness, being the following paper, annexed to the affidavit.

"\$500.

WASHINGTON, D. C., March 30th, '08.

"Ninety days after date I promise to pay to the order of John Cheney the sum of five hundred dollars for value received in a certain contract on Keating transferred to me under terms of special contract filed with the Jockey Club this day.

"WM. T. TOWNES."

The short note contained the usual common counts and a special count "For money due to the plaintiff by the defendant on the note annexed to this declaration, for the sum of \$500.00 due June 30, 1908, and not paid by the maker Wm. T. Townes as per the tenor thereof."

An amended account was afterwards filed, with leave of the Court, as follows:

"Wm. T. Townes to John Cheney, Dr.

"To amount due on paper writing March 30th, 1908, being drawn to the order of John Cheney by Wm. T. Townes, \$500.00.

"To amount due for first call on services of Jockey William Keating from March 30th, 1908 to July 1st, 1908, \$500.00.

"This last item being an alternative item of the first item herein set forth.

"Total amount due, \$500.00, together with interest from July 1st, 1908."

The attachment was dissolved by bond and the summons case came up for trial on the usual general issue pleas and a special plea that the paper writing was delivered in escrow and upon conditions which had not been complied with.

The plaintiff was the owner of and was interested in race horses and horse racing, and the defendant, who resided in Virginia, had a stock farm where he raised horses which he also employed in racing, and in March 1908, each of them had some horses on the track at Bennings, near Washington.

Mr. Cheney then had in his employment as a jockey, Wm. J. Keating, a boy then fifteen years of age, who was regularly apprenticed to him by an indenture dated March 27th, 1907, between Cheney and the boy, and the boy's father Michael Keating. This apprenticeship was for three years renewable for a further period of two years at the pleasure of said Cheney. Keating was to receive \$15 per month for the first year, \$20 per month for the second year, and \$25 per month for the third year and was to be instructed in the art or trade of a jockey, but was not to ride for any other stable than that of John Cheney during his apprenticeship, except upon engagements of said Cheney and under his direction.

Cheney's horses became sick at Bennings, and for that reason he testified he wished "to sell" Keating, and on March 30th, 1908, he entered into a written contract with Mr. Townes purporting to transfer to him the unexpired term of said apprenticeship, and any renewal made under the terms of the apprenticeship. The language of the contract was that Cheney "sells unto the party of the second part, first call on said boy's services during the term of the (original) contract yet unexpired and during any renewal thereof," * * *. It is agreed that the party of the first part shall have second call on said boy's services by giving reasonable notice of his desire to use him, said Townes not requiring his services for any such race. The original contract with said boy referred to in this instrument is now on file with the Jockey Club."

The note which was the basis of the attachment was executed at the same time, and Mr. Cheney testified that it was

Md.]

Opinion of the Court.

then put in the hands of Mr. Osborne, a mutual friend of the parties, to whom Mr. Cheney then said: "If Mr. Keating objects, or anything of that sort of course it won't go, and so he gave the note to Mr. Osborne and if all right he will send the note to you, and if it is not he will tear it up, and that this was mutually agreed to."

Mr. Townes testified that "the note was delivered to Mr. Osborne to hold until approval of the Jockey Club. * * * The note was for 90 days and was not to be effective until the boy's parents consented to it and the Jockey Club approved. Rule 153 of the Jockey Club provided that before the contract becomes effective it must be filed with the Jockey Club, and must be approved by the Stewards, * * * and the club will not approve a transfer unless the parents consent." The contract of transfer was filed with the Jockey Club April 2nd, 1908, and its receipt acknowledged in due course, but on April 22, 1908, the Secretary of the club wrote Mr. Townes informing him that he had returned it to Mr. Cheney, "as it had not been approved by the boy and the boy's parents." Mr. Cheney admitted he wrote for the consent of the boy's parents and received no reply, and Mr. Townes testified that the boy's father told him not to pay Mr. Cheney a cent, as he would not consent to the transfer, and Michael Kelly who was a trainer for Mr. Townes testified he heard the boy's father tell Mr. Townes not to pay Cheney, that he objected to the transfer. The boy worked for Mr. Townes until latter part of June, 1908, and he paid him \$20 a month during the time he worked for him. He informed Cheney on June 10th, 1908, that Keating's father would not consent to the transfer and demanded the return of his note according to the agreement, Osborne having delivered it to Cheney supposing the receipt of the Jockey Club for the filing of the contract of transfer warranted him in doing so. The defendant offered four prayers, withdrawing the case from the jury.

The ground of the first prayer was that the undisputed evidence shows that the consent of the boy's father was necessary to the transfer and that such consent was refused.

The ground of the second prayer was that there was no legally sufficient evidence of the approval of the transfer by the Jockey Club.

The ground of the third prayer was that there was no legally sufficient evidence of the consent of the father to the transfer.

And the ground of the fourth prayer was that there was no valid delivery of the note.

All these prayers were refused, and the case went to the jury without any instructions, and a verdict was rendered for the plaintiff for \$300.

The record does not disclose any reason assigned by the Court for this ruling, but the appellant in his brief states that the Court conceded there could be no recovery on the contract, but held there could be a recovery on a *quantum meruit* for the two months' service of the boy while awaiting the consent of the boy's father to the transfer. If it were conceded that a recovery on a *quantum meruit* could be sustained in such a case, the verdict would still be inexplicable under the undisputed evidence. But we cannot agree that the plaintiff is entitled to recover upon that theory in this case.

In *Jenkins v. Long*, 8 Md. 143, the Court said: "Evidence under a *quantum meruit* is only resorted to where the special contract, from its either having been violated or rescinded, is not sufficient to meet the case. But here such is not the fact. * * * It is not a case where evidence in a *quantum meruit* would be admissible as if the contract had been violated or abandoned *by the defendant*, or where it had been terminated *by consent of parties* after it was only partly performed."

In *Denmead v. Coburn*, 15 Md. 44, the action was on a special contract, and the declaration contained only the com-

Md.]

Opinion of the Court.

mon counts. The Court said: "If any recovery be had it must be, because the work was *fully performed* and accepted by the parties for whom it was done, or that the contract was *abandoned by the parties to it*, or that *by some act of the party* sought to be charged, the *fulfillment of the contract* was prevented." In the case before us none of the conditions are found, which the Court there said, were necessary to a recovery. The contract was not fully performed. It was not abandoned by consent of the parties. Its performance was not prevented by any act of the defendant.

In *Dougherty v. Gring*, 89 Md. 544, CHIEF JUDGE MC-SHERRY said in a similar case: "There can, in the nature of things, be no *implied* contract where there is an *express* contract. An implied contract arises by operation of law because of the absence of an express contract. As both parties to this controversy insist that there was an express contract, differing, it is true, according to their variant contentions, there can be no recovery on the basis of an implied assumpsit. There can be no recovery under the fourth count on the assumption that there was a special contract unless the contract was fully performed. There is no pretence that the contract sued on was performed. Under these conditions the plaintiff could not abandon the contract and sue on an implied agreement."

We cannot, consistently with the principles laid down in these cases, concur in the recovery which was allowed in the lower Court. We are of opinion that the prayers offered by the defendant directing a verdict in his favor should have been granted and for the error in their refusal the judgment must be reversed, and as there can be no recovery, a new trial will not be awarded.

Judgment reversed, without awarding a new trial, costs above and below to be paid by the appellee.

THE ENTERPRISE MANUFACTURING COMPANY
vs. OPPENHEIM, OBERNDORF AND
COMPANY.

*Contract for Purchase of Goods to be Delivered and Paid for in
Monthly Instalments—Right to Rescind for Defects in
Goods Delivered—Delay in Rescission—Use of
Goods in Defective Delivery—Waiver.*

When a purchaser orders from a manufacturer goods of a described kind, which are known in the trade to possess certain qualities, the same being a material part of the description, he is entitled to reject goods offered which do not possess those qualities.

When a contract calls for the delivery of certain goods in monthly instalments, each instalment to be paid for monthly, the failure of the buyer to pay for an instalment as stipulated entitles the seller to rescind the contract as to future deliveries, and the failure of the seller to make delivery of an instalment, or the substitution of inferior goods in a delivery, entitles the buyer to rescind the contract. It makes no difference whether such breach of the contract occurs at the beginning of the performance or afterwards.

The right of a buyer to rescind a contract for the purchase of goods to be delivered in instalments, if inferior goods had been substituted in a delivery, is not waived or lost unless he delays for an unreasonable time in notifying the seller of his purpose to rescind after he acquires knowledge of the defects in the delivery; nor is the right to rescind lost because the buyer made use of such defective goods before having knowledge of the defect.

Defendants agreed to buy nearly two million yards of plain sheetings of a designated size and weight, to be manufactured by the plaintiff company, under a contract which, as subsequently modified, provided that two hundred and fifty

Md.]

Syllabus.

thousand yards should be delivered in each month, in equal weekly instalments according to buyer's shipping directions, which were to be paid for within a designated time. It is customary for buyers of such goods, which are known in the trade as grey goods, to send them to a finishing mill to be bleached and processed, or converted, or printed. When such goods go from the manufacturer to the finishing mill, the only inspection usual or practicable is made at the mill manufacturing them, and no inspection of the bales is made at the finishing mill before beginning to process. Defects in such sheetings consist of drop threads, thick and thin places, misweaves, oil stains, etc. These defects are magnified in processing and greatly diminish the value of the finished product. The plaintiff company made four shipments of the sheetings mentioned in the contract to the finishing mill, when defendant notified them that they cancelled the contract on account of defects just discovered in the goods already shipped. Defendants had at the time paid for the last three shipments which had been processed, but had not used the first shipment. This they offered to return. Plaintiff company claimed in this action the contract price for the goods already made and the balance due on the goods delivered and damages for defendant's breach of the contract. *Held*, that the evidence shows that the defects in the sheetings delivered were such that the goods did not comply with the contract, which called for sheetings known in the trade as "firsts".

Held, further, that this failure to deliver the kind of goods called for entitled the defendants to rescind the contract.

Held, further, that this right to rescind was not lost or waived because the defendants had caused the goods contained in three of the shipments to be processed, since the defects in them were not discovered until after the processing had taken place, and the defendants acted with reasonable promptness after the discovery of the defects.

Held, further, that consequently the plaintiff company is not entitled to recover in this action.

Decided January 11th, 1911.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and UERNER, JJ.

Edgar Allan Poe, for the appellant.

1. On December 21, 1907, when the appellees recognized the contract with the appellant as still in force by agreeing to and accepting a modification thereof, they knew, or had every means of ascertaining, the character of the goods that were being furnished by the appellant under said contract and had been put upon full inquiry, and their election on that day to treat the said contract as still subsisting was therefore final, and their right to rescind for a prior default was extinguished. In *Cole v. Hines*, 81 Md. 479, this Court said: "A party cannot take two inconsistent positions. If he has a right either to rescind a contract on account of a breach by the other party, or to continue it in force, and he elects to continue it in force, he thereby abandons the right to rescind and is bound by the election so made." See also *Groff v. Hansel*, 33 Md. 111.

So also in *Weaver v. Shriver*, 79 Md. 350, where it was alleged that the plaintiff had been induced through false representations to purchase certain shares of stock, the Court, reaffirming *Groff v. Hansel*, added: "If after the discovery of the alleged fraud the plaintiff treated the contract as still in force, and we think there is sufficient proof in the record to justify the jury in finding that he did so, such ratification would only have the effect of preventing a subsequent rescission."

If we apply these well-known principles, so clearly laid down by this Court, to the facts in this case, it is difficult to perceive on what possible theory the Court below held as a matter of law that the appellees were entitled to rescind the

Md.]

Argument of Counsel.

contract on the 23d day of December, 1907. Certainly it should have been left to the jury to determine the questions of fact, involved, to wit: Whether, on December 21, when the appellees accepted and agreed to a modification of the contract they knew, or having been put upon full inquiry, should have known that the appellant had failed to comply with the requirements of the contract.

What new fact was brought to the attention of the appellees between Saturday, December 21st, when they recognized the contract as still subsisting by agreeing to the modification, and Monday, December 23d, when they attempted to rescind it? None whatever. No new bales arrived; no new samples put in an appearance. The only suggestion that might be offered, though there is no evidence to support it, is that a more thorough examination of the one bale on hand was made. Such an additional examination, in the circumstances, however, would not be sufficient legal justification for a change in the attitude of the appellees. They had had the bale since December the 17th, having sent for it for the express purpose of examining it. It took but an hour and a-half to make a complete examination, and such complete examination had been made several times by several persons prior to December 21st.

On the 21st of December Oppenheim had notice of certain defects in the goods that had been shipped. He knew they were serious; so serious, indeed, that upon further reflection, two days later, without any additional information, he made up his mind that he would risk a cancellation of the contract. Certainly he cannot complain if it is held that the same knowledge which would justify him in rescinding the contract would estop him from repudiating an election deliberately made. It may be that Oppenheim, in thinking the matter over on Sunday, reached the conclusion that the defects which had been discovered gave him a legal excuse for getting rid of what had turned out to be a most disadvan-

tageous contract, and that this idea had not occurred to him on the preceding day. This, however, is not the point. The question is merely one of election with knowledge or with means of knowledge.

2. On December 21st, a new contract was entered into between the appellant and appellees based upon a valuable consideration, and the appellees could only be released from the obligations resulting therefrom by some breach on the part of the appellant occurring subsequent to December 21st.

The original contract provided for the delivery of the goods at the rate of 350,000 yards monthly, in November, December, January, February and March. In October, 1907, there was a financial panic, due to the failure of the Knickerbocker Trust Company of New York and other financial institutions. The customers of the appellees began arbitrarily to cancel orders and, in consequence thereof, the appellees were in a tight place, were very much worried and embarrassed, and could not afford to be crowded. The appellant was accordingly requested to modify materially the original contract. This, of course, meant a pecuniary loss to it. It modified, however, the contract by postponing one month's shipment entirely and thereafter cutting down the shipments to such an extent that the time of the completion of the contract was postponed for three months. The result of this was, of course, that the appellant would be kept out of a large part of the purchase price during that time, although, as the appellant stated in one of its letters, "it took money to run a cotton mill."

On December 21st, therefore, when the final modification was affected, a new contract was made between the parties. *Linz v. Schuck*, 106 Md. 220.

This being so, the appellees manifestly had the right to rescind this new contract of December 21st only. 1. Because of fraud practiced in the procuring of the contract. 2. Because of a breach of its terms by the appellant.

Md.]

Argument of Counsel.

There is no pretence or claim that any fraud was practiced in the securing of the new contract. In what way was there any breach of any of its terms by the appellant? No deliveries were to be made until January 1st, and there was nothing therefore for the appellant to do until January 1st.

The appellant gave no notification to the appellees of any intention on its part not to be bound by the terms of the contract which, of course, would have justified the appellees in rescinding, but on the contrary, at all times tendered itself ready and willing to furnish the goods specified both as to qualify and quantity, and at the trial proved by competent witnesses its ability to make proper deliveries.

All the testimony of the appellees bore upon the character of the goods in the first four shipments, which goods were in no way involved in the new contract of December 21st, and no attempt was made by the appellees to in any way impeach the testimony offered on behalf of the appellant as to the character of the goods covered by the invoices beginning January 1, 1908.

3. The goods called for by the first four shipments were accepted by the appellee, and the right to rescind the contract on account of defects in said goods was thereby lost. It is conclusively established in Maryland that the acceptance of goods precludes the party so accepting from afterwards rescinding the contract on account of any defects existing in the goods themselves. In *Central Trust Company v. Arctic Machine Company*, 77 Md. 237, 238, this Court says:

"The acceptance of the machines was no waiver of this warranty and does not deprive the purchaser of the right to sue on the warranty, or to rely by way of defence upon a counter-claim or recoupment in the vendor's action for the price, if the machines were defective in material and workmanship. It has been held that this is so whether the defect be latent, patent or discoverable. "An acceptance does no

more than preclude the purchaser from rescinding the contract and returning the property."

So also in *Kernan v. Crook, Horner & Company*, 100 Md. 222, where the Court said: "If he once accepted these articles he could not afterwards reject them nor rescind the contract. *Cole v. Hines*, 81 Md. 476." "If they proved to be defective or unsound or did not reasonably or substantially answer to the representations made at the time of their sale to him and he suffered any loss or damage therefrom, he was entitled to rely on those facts by way of defence or recoupment and thereby diminish the amount of the recovery against him."

The inquiry therefore resolves itself into whether the appellee accepted the goods or any of them in the first four shipments, or whether there was any evidence in the case from which the jury could have found such acceptance? The lower Court took the view that there was no evidence of acceptance. The appellant's contention below was, and it is repeated here, that there was not only evidence from which a jury could and should have found acceptance but that the evidence was of such a character as to amount to acceptance in law.

The goods were shipped, according to instructions, to an eastern bleachery, where, under orders from the appellees, as owners of the goods, the character of the goods, in all but the first shipment, was changed. Afterwards the appellees, as such owners, sell large quantities of them, and make delivery, and convert the balance into shirts, thus putting it absolutely beyond their power to make restitution. What better evidence can be produced showing acceptance? Was not the changing of the character of the goods, followed by the selling of them, the exercise of acts of ownership over them, and acts of wrong, if the appellees were not the owners of the goods, but of right if they were the owners of the goods? Was not the doing of those acts by the appellees

Md.]

Argument of Counsel.

absolutely inconsistent with every other hypothesis, except that the goods were theirs, and how could they have been theirs unless they had accepted them?

The appellees attempted to meet this argument by claiming that the character of the goods was inadvertently changed before they could have ascertained that the goods were not such as they had ordered, and that in so changing the character of the goods they were not guilty of a breach of duty to inspect the goods. There is no such thing in law as duty to inspect. The vendee has the right to inspect, but it is a right which he may waive, and frequently does waive, relying upon performance by the other party to the contract. He waives this right, however, at his peril, and if he afterwards discovers that his confidence has been misplaced he must bear the legal consequences. He is not without redress, however. He is merely deprived of a certain redress, to wit: the right to rescind the contract. His right of recoupment still remains.

Acceptance of the goods, by the appellees, is shown not only by their conduct, but also by their own words. As especially bearing upon acceptance of the goods contained in the first shipment, the attention of the Court is directed to the case of *Cream City Glass Company v. Friedlander*, 84 Wis. 53, where the Court held that after the vendee of the goods had decided that they were not fit for the purposes for which they were purchased, and had notified the vendor of his decision and of his rejection of the goods, he could not, thereafter, use a portion of them in making a practical test for the purpose either of determining the question of their fitness or of providing evidence of their unfitness, and still insist upon the right to reject them.

Upon the subjects generally of acceptance, the right of inspection, and the extinguishment of the right to rescind after acceptance, see *Meechem on Sales*, Ch. VII, and especially sections 1375, 1380, 1387, 1391, 1393, 1398 and

1399. *Waukesha Canning Company v. Horn & Company*, 138 Ill. App. 564; *Henderson Elevator Company v. North Georgia Milling Company*, 126 Ga. 279; *Fox v. Wilkinson*, 14 L. R. A. (N. S.) 1107; *Lawder Co. v. Mackie Grocery Co.*, 97 Md. 14; *Mason et al. v. Smith et al.*, 130 N. Y. 480.

4. The failure of the appellees to return, or to offer to return, the goods furnished under the first four shipments precluded the appellees from rescinding the contract.

It is admitted that the appellees never attempted to return, and never offered to return any of the goods contained in the second, third and fourth shipments, although it is contended that sometime after the attempted rescission of the contract, on December 23, 1907, Woodward, Baldwin & Co., were notified that the goods in the first shipment were at their disposal. Even as to these goods, however, the appellees, after said notification, continued to exercise acts of ownership by giving shipping instructions, and by numerous examinations of them.

In *Horner v. Parkhurst*, 71 Md. 116, the Court, in speaking of the right to rescind, states the law, as follows: "If there was an express warranty that the benzine should be sixty-eight degrees specific gravity, and it turned out to be an inferior quality, then to entitle the defendant to a rescission of the contract, it was incumbent on him to return, or to offer to return it to the plaintiffs within a reasonable time after he discovered its quality; and if he failed to do so, the plaintiffs were entitled to recover the market value of the benzine." See also *Horn v. Buck*, 48 Md. 372, and *Franklin v. Long*, 7 G. & J. 407.

Edgar H. Gans and *Charles Markell*, for the appellees.

1. The failure of the plaintiff to deliver goods of the kind and quality called for by the contract gave the defendants the right to rescind the contract. No question of breach of warranty, express or implied, is presented in this case.

Md.]

Argument of Counsel.

There is simply a failure on the part of the plaintiff to deliver goods of the kind and quality called for by the contract. The defendants contracted to buy "firsts." The plaintiff did not deliver "firsts," but did deliver a different commodity not called for by the contract, viz., "seconds." For the failure to deliver the goods called for by the contract the defendants rescinded the contract. *Col. Iron Works v. Douglas*, 84 Md. 44.

In *Josling v. Kingsford*, 13 C. B. N. S. 447, 32 L. J. C. P. 94 (referred to in *Benjamin on Sales*, sec. 605), there was a sale of oxalic acid. The vendor did not warrant quality, and the article delivered had been examined and approved, and a great part of it used by the purchaser when on analysis it was afterwards found to be chemically impure from adulteration with sulphate of magnesia. There were two counts in the declaration, one for breach of contract to deliver "oxalic acid;" the other for breach of warranty that the goods delivered were oxalic acid. It was held that there was no evidence of a warranty, but that it was a question for the jury whether the article delivered came under the denomination of "oxalic acid" in commercial language. A verdict for the plaintiff was sustained.

The testimony in the record leaves no question for the jury whether the goods delivered were in commercial language "plain sheetings, soft twisted yarn." The witnesses for the plaintiff and those for the defendant agree that "seconds" do not in commercial language come within the description of the goods in the contract.

The right to rescind a contract of sale of goods to be delivered in instalments, for non-delivery of one or more instalments according to the contract, though the subject of conflicting decisions elsewhere, is not now involved in doubt in Maryland, or, indeed, in the Supreme Court of the United States, and most of the Courts in this country. The decisions in England are difficult to reconcile, though, perhaps,

the later English cases recognize the right to rescind only when non-delivery or non-payment occurs under circumstances amounting to a refusal to further abide by the contract or inability to do so.

Early cases frequently discuss the question whether the contract is an entire or a divisible contract. This was discussed in the case of *Maryland Fertilizer Co. v. Lorentz*, 44 Md. 218, though the question actually presented and decided in that case was whether there had been a waiver of the breach of contract. The later cases, in this country and in England, concur in the view that an instalment contract is an entire contract, the cases conflicting on the question whether a breach of contract as to one instalment is an entire breach, *i. e.*, a breach of the entire contract. Thus, the House of Lords in *Mersey Steel Co. v. Naylor*, 8 App. Cases, 434, holding that a vendor was not entitled to rescind for non-payment for one instalment, and the Supreme Court of the United States in *Norrington v. Wright*, 115 U. S. 188, holding that the purchaser is entitled to rescind for non-delivery of one instalment, agree that in either case the contract is an entire contract. *Norrington v. Wright*, is the leading case in the country. The opinion of the Court by Mr. Justice Gray reviewed at length the English cases, and some of the cases in this country, and stated the substance of the Court's decision in the following sentence: "The seller is bound to deliver the quantity stipulated, and has no right to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once." 115 U. S. 204-5.

Md.]

Argument of Counsel.

It is worth noting that half of the sentence just quoted, though not the part of the sentence particularly in point in the present case, was quoted with approval by this Court in the case of *Salmon v. Boykin*, 66 Md. 541, 550. The Supreme Court, in *Norrington v. Wright*, distinguished the case of *Mersey Steel Co. v. Naylor*, on the ground that that case involved only non-payment for one instalment, while *Norrington v. Wright* involved non-delivery, which the Supreme Court considered the more essential breach of contract, giving a right to rescind, even though non-payment might not in all cases give such right.

This Court has gone much further than the Supreme Court of the United States in upholding the right to rescind for default with respect to one instalment, and has repeatedly affirmed the right to rescind for non-payment, as well as for non-delivery of one instalment. One of the first cases in this Court in which the right to rescind an instalment contract was directly involved, was *Bollman v. Burt*, 61 Md. 415. In that case, as there had been a failure to deliver any of four successive instalments, this Court refrained from deciding whether non-delivery of one instalment would have warranted rescission, but did decide that non-delivery of the fourth instalment, after three defaults had been waived, gave a right to the purchaser to rescind.

In each of the three subsequent cases of *McGrath v. Gegner*, 77 Md. 331, 336-7, *Baltimore City v. Schaub*, 96 Md. 534, 552-5, and *Webster v. Moore*, 108 Md. 572, 595, this Court affirmed the right of a vendor to rescind for non-payment of one instalment.

The cases of *Baltimore City v. Schaub* and *Webster v. Moore* go much further than it is necessary to go in this case. In *Baltimore City v. Schaub*, a contractor was held to be entitled to rescind a contract to sell coal to the City of Baltimore on account of non-payment for previous deliveries. As the city's ability to perform its contract was, of course,

not questioned, and its failure to pay was due to a *bona fide* dispute as to the construction of the contract with respect to times of payment, it might seem that the vendor could have been adequately compensated in damages. This Court, however, upheld his right to rescind.

In *Webster v. Moore*, a purchaser of canned tomatoes refused to make payment in full, claiming the right to deduct damages on account of inferior tomatoes delivered and paid for on previous instalments under the same contract. This Court held that refusal to pay the contract price, even though the purchaser's claim for damages were well founded, entitled the vendor to rescind the contract.

Since the right to rescind for non-payment for one instalment is thus established in this State, though denied by the House of Lords and not yet recognized by the Supreme Court of the United States; *a fortiori*, will the right to rescind for non-delivery, which is recognized by the Supreme Court as a less drastic right than the right to rescind for non-payment, be recognized by this Court.

The same principles apply to non-delivery or non-payment of an instalment after previous instalments have been delivered, or previous breaches have been waived, as apply to a breach of contract with respect to the first instalment. *Kakas v. Hollingshead*, 184 N. Y. 211, 3 L. R. A. (N. S.) 1042.

After part performance, the rights and duties of the parties as to the performance of the part which remains unperformed, are the same as if that part had been the whole contract between them. *Cleveland Rolling Mill Co. v. Rhodes*. 121 U. S. 255, 263, 264.

This principle is involved, if not expressly so stated, in the decisions of this Court already cited. The principles herein referred to were applied to this case by the lower Court. In fact, we do not understand that the plaintiff questions the right of the defendants to rescind the contract for breach of contract with respect to any one of the first four

Md.]

Argument of Counsel.

shipments. We understand that the sole contention of the plaintiff is that this right to rescind was waived and lost by the defendants, by reason of the disposition made of the goods in the second, third and fourth shipments, and by reason of other circumstances on which the plaintiff relies.

2. The defendants did not by their actions waive or lose the right to rescind. As the plaintiff practically basis its case on the doctrine of waiver, it is well to point out at the outset that the question of waiver is not, in this case, as it frequently is, connected with any question of estoppel. The plaintiff comes into Court, compelled to confess that it has repeatedly broken, in its most essential particulars, the contract on which it sues, and that it thereby gave the defendants the right to do just what they did do, viz., to rescind, which right it, however, claims the defendants waived.

No one has been, and no one possibly could have been, prejudiced by delay in exercising the right to rescind, except the defendants themselves. The plaintiff has not even been prejudiced by being induced to manufacture more goods, for, as a matter of fact, when it did receive notice of cancellation, it did not stop, but continued to make goods for more than two months longer.

The only practical consequence, aside from rules of law, of the goods of the second, third and fourth invoices having been put in process before the defendants discovered the character of these goods or the goods of the first shipment, was that the defendants paid the full contract price,—over \$10,000.00,—for “seconds,” which they could not return, but which could not be of any use to them, while the plaintiff received \$10,000 for goods which it could not otherwise have marketed at any price. Several weeks before November 25, 1907, when the second shipment left Augusta, the market, on account of the panic, had not merely fallen, but there was no market at all. Had the defendants been seeking to evade their obligations they might have had a special examination

made of the first shipment before the subsequent shipments went into process. That they followed the usual custom of the trade and did not do so was not due to self-interest. They were the losers, the plaintiff the gainer, thereby.

Under such circumstances the absence of hasty action only indicates consideration for the rights of the plaintiff and a desire not to assert claims prompted by self-interest but without a just basis; it certainly does not indicate an intention to relinquish rights and does not prejudice the plaintiff. There never was, in November or December, 1907, any possibility of juggling the plaintiff's rights by delay and benefiting by a turn of the market. There was no market to turn. It was always to the pecuniary interest of the defendants to rescind; if they did not exercise that right as promptly as they might have done, the plaintiff, not they, benefited thereby. The mere fact that such delay as there was, avoidable or unavoidable, cost the defendants over \$10,000 and benefited the plaintiff to the same extent, does not seem a sound reason for imposing further liability on the defendants.

The plaintiff, in the lower Court, relied principally on the fact that the second, third and fourth shipments had been put in process, as evidence of a waiver of the right to rescind. It was contended that this use of the goods, rendering it impossible to return them in their original condition, amounted in law to a waiver of the right to rescind, and that this waiver resulted, irrespective of whether the defendants had knowledge of the facts which gave rise to their right to rescind, and therefore irrespective of whether they intended to waive their right.

If this contention be sound, then in the law of sales, the term waiver has not its ordinary meaning and the principle that a man cannot take advantage of his own wrong has no application.

Waiver is defined by Bouvier as "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it."

Md.]

Argument of Counsel.

Both knowledge and intent are essential elements of a waiver. This is as true in the law of sales as in other branches of the law. All of the many cases cited by the plaintiff below in support of the proposition that the use by a purchaser of goods bought, so that he cannot return them, amounts to a waiver of the right to rescind, were cases where such goods were used with knowledge, or the equivalent of knowledge, of the facts on which the right to rescind depended. The case of *Lyon v. Bertram*, 20 Howard, 149, which was cited by the plaintiff below, and was followed in a recent *Georgia case*, also cited by the plaintiff below, is a fair example of the cases relied on. The point there decided, as stated in the head note, was that "where an article is warranted and the warranty is not complied with, a purchaser who has received and paid for and used a portion of the article and derived a benefit from it, cannot then rescind the contract."

Although the Court did not dwell on the fact that the goods were used with knowledge or full means of knowledge of the breach of warranty, yet that fact did clearly appear in the opinion, and was essential to the decision of that case, as has been explained in subsequent decisions of the Supreme Court.

Thus, in *Pope v. Allis*, 115 U. S. 363, 373, the Court, in the course of its opinion, said: "We have been referred by the plaintiffs in error to the cases of *Thornton v. Wynn*, 12 Wheat. 184, and *Lyon v. Bertram*, 20 How. 149, to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first, there was an absolute sale, with warranty and delivery to the vendee, of a specific chattel, namely: a race horse; in the second, the sale was of a specified and designated lot of flour, which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract."

And in *Norrington v. Wright*, the same Court not only distinguished the case of *Lyon v. Bertram*, but stated the principles which are applicable to the case at bar: "The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February and 855 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

"The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge, that the stipulated quantity had not been shipped in February."

The Supreme Court thus distinctly holds that the acceptance and use of one instalment of goods, without knowledge of the facts which give a right to rescind, is no waiver of the right to rescind. The Court also incidentally alludes to two subsidiary circumstances, viz., that the plaintiff suffered no injury by the omission of the defendants to return the first shipment of iron, having been paid more than the market price for it, and that no reliance was placed on the omission to return the iron in the correspondence between the parties.

Singularly enough, all three of the reasons given by the Supreme Court for holding that there was no waiver apply to this case. The defendants had no knowledge, and no practical means of knowledge, of the quality of the goods that were put in process, according to the universal custom of the trade, in reliance on the inspection which it was the duty of the plaintiff, not of the defendants, to make, and which it was not only impossible, but unnecessary, for the

Md.]

Argument of Counsel.

defendants to duplicate had the plaintiff discharged its duty. The plaintiff also suffered no injury in this case, but, on the contrary, derived a benefit from the inability of the defendants to return the second, third and fourth shipments, receiving thereby over ten thousand dollars (\$10,000) for goods which were defective in quality, and regardless of quality, could not at that time have been marketed at any price. Furthermore, no reliance was placed on the inability to return these goods in any of the correspondence between the defendants and the plaintiff's representatives.

It would be impossible to find a case more nearly in point, as it would be impossible to find a case of higher authority (outside of the decisions of this Court itself), than *Norington v. Wright*. Other cases of high authority, not so close to the present case on the facts, nevertheless apply the same principle, that in the law of sales, as in every branch of the law, knowledge is essential to constitute a waiver. *Josling v. Kingsford*, 13 C. B. N. S. 447; 32 L. J. C. P. 94.

This Court has more than once applied the principle that use, or acts of ownership, while they may establish title to the thing used, do not necessarily amount to acceptance under a contract, where such use or acts of ownership are not inconsistent with non-acceptance. Applying this principle to building contracts, it is held that when of necessity a man exercises ownership over a structure erected on his land he does not thereby accept such structure as in compliance with a contract for its erection. *Pope v. King*, 108 Md. 37.

The rule that on rescission of a contract of sale the goods must be returned, and the right to rescind is waived by using the goods so as to make a return of them impossible, is in no sense an inflexible rule, or a qualification of the principle that knowledge is essential to a waiver. As was held by the Supreme Court of Kansas, "the rule that upon the rescission of a contract for the purchase of a chattel the parties must be placed *in statu quo* does not require in all cases that an absolute and literal restoration shall be had; but it will be

sufficient if such restoration shall be made as is reasonably possible, and such as the merits of the case demand." *Fairbanks Co. v. Walker*, 76 Kas. 703; 17 L. R. A. (N. S.) 558.

The rule requiring a return of the thing sold is only an application of the general principle that a man cannot occupy two inconsistent positions, or play fast and loose by repudiating a contract and at the same time retaining benefits under it. The rule is not imperative when there is no such inconsistency; as, for instance, when the purchaser is unable to return the goods, without fault on his part, or *a fortiori*, when he is unable by reason of the default of the vendor.

Thus, it was held by the Supreme Court of Alabama in the case of *Magee v. Billingslea*, 3 Ala. 699, 702-3 (a case cited with approval by the Supreme Court of the United States in *Pope v. Allis*, 115 U. S. 363, 372), that the accidental destruction of goods by fire is not a bar to rescission, if such destruction occur before a reasonable time after the discovery of defects in the goods.

In *Bunch v. Weil*, 72 Ark. 343, 65 L. R. A. 80, it was held that one who purchases flour in quantities by the barrel for resale may, upon discovering that the flour delivered is not in accordance with the contract, after having sold part of it, rescind by tendering back as much as is undisposed of and recover back the purchase price less what he has realized from the sales.

The decisions in this State and elsewhere in cases of sales of goods to be delivered in instalments demonstrate that the rule requiring, as a condition of rescission, a complete return of the goods sold, is not an inflexible rule, but is limited by the necessities of the case. If this were not so, the right to rescind could practically never be exercised in case of a default as to any instalment except the first, since it would be a practical impossibility to return the goods delivered on previous instalment. The established rule is, however, that the right to rescind exists in case of default on any instalment.

Md.]

. Argument of Counsel.

There is nothing in any of the cases relied on by the plaintiff below which really conflicts with the cases we have cited, or with the principles which, we submit, must govern this case. A purchaser cannot knowingly, or with full means of knowledge, use a defective article, and then, when he is unable to return it, rescind the contract of purchase. The law helps those who help themselves, and will not permit a man to shut his eyes to obvious defects and then claim to have been ignorant of them. But the law does not compel merchants to treat each other as cheats. It does not require a purchaser to assume that his vendor will break his contract or perpetrate a fraud upon him. It does not require him to depart from an universal custom of the trade and to attempt to make an inspection which is physically impossible, simply to ascertain whether the vendor has neglected his duty to make such an inspection when it was not impossible. Still less does the law impose such a burden on the purchaser as a duty to the vendor, whose fraud or neglect alone could make such second inspection useful. A new cause of action will have been discovered when a vendor may sue his vendee for breach of duty to seek out and discover the vendors's fraud—or his wilful neglect, equivalent to fraud.

The reasoning of the plaintiff with respect to the duty to return goods as a condition of rescission leads to curious results. It is not denied that the defendants were entitled to rescind the entire contract on account of any one of the four shipments of defective goods, provided the goods in such shipment were returned or tendered. It is not denied that each of the four shipments was defective and warranted a rescission. It is claimed, however, that the defendants could not rescind on account of the second, third and fourth shipments, because those goods were put into process; and that they could not rescind on account of the first shipment, which was not put into process, because that default was waived by putting the second, third and fourth shipments into process.

If, instead of putting the goods of the fourth shipment into process, the defendants had put the first shipment into process, there would have been no obstacle, according to the plaintiff's theory, in the way of rescission. There would still have been four defective shipments, each entitling the defendants to rescind. There would still have been only one out of the four shipments on hand capable of being returned on rescission, but because that shipment of goods on hand would have been numbered four, instead of one, in the order in which the goods left Augusta, the defendants would have had the right to rescind, which the plaintiff now contends they waived. In other words, the substantial rights of the parties depend upon a juggling of figures.

The law of sales is not such a trick in arithmetic. The use of a subsequent shipment amounts to a waiver of a default as to a previous shipment, not because the one is labelled "2" and the other is labelled "1," but only when and because, as in *Bollman v. Burt*, the use of the subsequent shipment with knowledge of the previous default is inconsistent with any intent, except an intent to waive the default. If, after the defendants had discovered the defective quality of the second, third and fourth shipments, they had made use of the goods in the first shipment, which were still on hand, such use of the first shipment would have been a waiver of the defaults as to the second, third and fourth shipments, just as fully as the use of the fourth shipment with knowledge would have been a waiver of the default as to the first shipment. The waiver depends upon knowledge, not upon any magic sequence of numbers.

The plaintiff very strenuously argued below that the defendants had waived their right to rescind by accepting, on the 21st of December, a modification of the contract so as to reduce subsequent monthly deliveries under the contract from three hundred and fifty thousand to two hundred and fifty thousand yards, besides making no deliveries in December, which had already been agreed to. It was argued that

Md.]

Argument of Counsel.

the acceptance of this modification on the 21st of December was a recognition of the existence of the contract, which amounted to a waiver of the right to rescind. As it is claimed that this modification was accepted on December 21st, while the contract was not formally rescinded until December 23rd, this argument is substantially only another form of the contention that the defendants were guilty of unreasonable delay in exercising their right to rescind. Unless there was an unreasonable delay in not rescinding sooner than December 23rd, there could be no inconsistency in accepting this modification of the contract on December 21st. Until the contract was actually rescinded, it was undoubtedly in force, and the acceptance of a modification of the contract, as the culmination of negotiations begun weeks before when there was no suspicion of grounds for rescission, was no more an affirmation of the contract than mere non-action or failure to rescind. Of course, as has already been remarked, there is no element of estoppel involved; it is not pretended that on or after December 21st the plaintiff did take or could take any action to its prejudice as the result of an agreement to deliver two hundred and fifty thousand (250,000) yards, instead of three hundred and fifty thousand (350,000) yards in January. If, therefore, the defendants delayed unreasonably in not rescinding before December 23rd, such delay might amount to a waiver of the right to rescind; if they did not delay unreasonably, the contract was in force until December 23rd, and the acceptance of the modification on December 21st was consistent with this fact. The contract was at all times either in force or not in force. There could be no middle position.

On the facts shown in the record there is no semblance of unreasonable delay on the part of the defendants in exercising their right of rescission. It must be remembered that the contract rescinded was a contract for the sale of one million, seven hundred and fifty thousand yards—almost a

thousand miles—of goods. The defendants had to determine not only the actual condition of the one bale of goods which they had ordered down from Rhode Island, but also whether the condition of that bale was such as to warrant the inference that the other one hundred and eighty-one bales were also defective, and to justify them in rescinding a contract which covered more than twelve hundred bales. The bale was ordered immediately when the first half-yard sample was received, and did not arrive until December 17th, late in the afternoon, after Mr. Oppenheim had left for New York. Mr. Oppenheim did not return until Friday evening, December 20th; spent all day Saturday, until six o'clock, with Mr. Baldwin examining the bale of goods, and on Monday morning formally rescinded the contract. There was, therefore, not only no unreasonable delay, but no delay at all.

PEARCE, J., delivered the opinion of the Court.

This suit was brought by The Enterprise Manufacturing Company, a corporation doing business in Augusta, Georgia, against Oppenheim, Oberndorf and Company, co-partners, of the City of Baltimore, claiming one hundred thousand dollars damages for the alleged breach of a contract for the purchase by defendants from the plaintiff of one million seven hundred and fifty thousand yards of cotton goods.

The plaintiff owns and operates a cotton mill, and the goods it manufactures are known to the trade as "grey goods." There is some sale for these goods as they come from the mill unbleached, but their principal and most extensive use is for printing and dyeing to be made up into various garments. Purchasers of these goods for the latter purpose, are known in the trade as "Converters," and such purchasers ship such goods for that purpose to a "finishing mill" or "print mill," usually somewhere in New England, and when thus "finished," or "processed," the goods are shipped to the purchaser or to his customers, who make them

Md.]

Opinion of the Court.

up into shirts or other garments. The defendants are both "converters," selling the processed goods to other persons who are their customers, and also shirt manufacturers, doing a large business both in Baltimore and New York.

Woodward, Baldwin and Company are large dry goods commission merchants in Baltimore, who sell the products of many Southern cotton mills, and had for twenty-five years represented the plaintiff in that way, and they had during that period sold large quantities of plaintiff's goods to the defendants. The contract sued on in this case was as follows:

"Date, 7/15/—7.

Sold to Oppenheim, Oberndorf & Company, Baltimore Md.,

By W. B. & Co.:—

Quantity, 1,750,000 yds.

Grade, Plain sheetings, soft-twisted yarns.

To count, 52x44 picks to square inch.

Weight, not lighter than 5 yards to pound.

To be 36 inches wide.

Cuts to run D. C. yards each.

Bales to contain yards.

Price, 5¾.

Terms, 2%, 10, 60 ex.

Delivery, 350,000 yds., monthly, equal weekly, Nov, Dec., '07,

Jny., Feb., Mch., '08.

Freight prepaid to Blechy.

Shipping directions Later.

Accepted, seller

S. BALDWIN, JR.

Accepted, buyer,

O. O. & Co."

(Record, page 36.)

And in executing it, Woodward, Baldwin and Company acted for the plaintiff, their undisclosed principal.

The declaration contained the common counts, and a special count setting out the contract. This count alleged that defendants actually received and accepted from the plaintiff 350,195 yards of the goods manufactured for them and had

paid on account thereof \$10,371.45, leaving a balance due thereon of \$9,791.04. It then alleged that on December 21, 1907, the original contract was modified by providing that deliveries should not begin until January, 1908, and that the monthly deliveries should be reduced from 350,000 to 250,000; that in accordance with such modification, it manufactured the further quantity of 1,045,648 yards of said goods, and tendered the same at the proper times to the defendants, who refused to accept or pay for the same, and on December 23, 1907, notified the plaintiff that they rescinded said contract, whereupon the plaintiff discontinued the manufacture of goods under the contract though ready and willing to perform said contract, and though it had incurred large expense in preparing to do so. It then alleged there was due the plaintiff the full contract price for the goods manufactured and tendered as above stated, in addition to the balance of \$9,791.04 for the goods delivered, and also a large sum for profits lost by reason of the cancellation of said contract. The defendants pleaded the general issue, and a special plea of set off, alleging a breach of the same contract by the plaintiff in the delivery of several instalments of goods, not "firsts" such as the defendants had contracted for, and not proper or merchantable goods under said contract, but which the defendants paid for assuming that they would be proper deliveries under said contract, and without having had an opportunity, in the reasonable conduct of their business, to inspect said goods or to discover the defects which were disclosed when examined, but that as soon as these defects were discovered they cancelled said contract and demanded payment of the loss sustained by reason of said improper deliveries, to the amount of \$15,000. The issues were properly joined on all the pleadings, and at the close of the testimony which was voluminous, the plaintiff offered six prayers, and the defendants offered eleven. The Court rejected all the plaintiff's prayers, and also rejected the de-

Md.]

Opinion of the Court.

defendants' tenth and eleventh prayers which were based upon their plea of counter-claim or set-off, and granted the defendant's first prayer, that under the pleadings there was no evidence legally sufficient to entitle the plaintiff to recover, and therefore their verdict must be for the defendant.

The modification of the original contract was brought about in this way. That was made in July, 1907, when the market for "grey goods" was steady and prices firm. In October, 1907, a financial panic was impending, threatening general disaster, and especially to those interested on a large scale in the manufacture and conversion of cotton goods. The defendants had at that time, numerous contracts similar to the present, many of which were made through Woodward, Baldwin & Company, who were familiar with existing market conditions. Sometime in November, Mr. Oppenheim informed Woodward, Baldwin & Company that his customers all over the country were cancelling their contracts and that it would be a great hardship for him to have to take that lot of goods according to the original deliveries, and requested them to endeavor to arrange for an extension of deliveries, or if possible for buying out the contract. They took up this matter with the plaintiff, and failing to secure the buying out of the contract, endeavored to have the monthly deliveries cut in half, but failed in this also. The plaintiff, while declining this proposition, offered "to hold back twenty per cent. of monthly deliveries until times become normal again. This is the best we can do to help buyer." This was not satisfactory to defendants, and Woodward, Baldwin & Company so wrote the plaintiff, saying: "We ourselves know that we cannot afford to crowd him, and are quite sure if you were on the spot that you would feel as we do. We are satisfied you will do everything to alleviate this position which is possible." This was on December 11th, 1907. On the 17th of December plaintiff offered to make no delivery for December and thereafter to

deliver monthly 250,000 yards until the contract was completed, and on December 21, 1907, defendants accepted this modification, and on the same day Woodward, Baldwin & Company so notified plaintiff by letter, "thanking them for the accommodation." It will be noted that the modification thus made had exclusive reference to the extension of time and reduction in quantity of monthly deliveries, and left the *character* of goods the same, though by a previous agreement, the width of the goods had been changed from 36 to 37 inches, the weight per yard remaining the same, and the price changed from $5\frac{3}{4}$ cents to $5\frac{7}{8}$ cents per yard. The negotiations for the final modification of the contract were conducted on all sides in the broad and liberal spirit which characterises the conduct of men accustomed to deal in large transactions, and mindful of the wisdom of mutual concessions in time of financial stringency or panic.

On October 1st, 1907, before the approaching panic had been taken into account by the parties, the defendants gave shipping instructions to the plaintiff directing the first weekly instalment of goods to The Southbridge Printing Co., Mass., and the balance, until otherwise instructed, to S. H. Green & Son, Clyde, R. I.; but later, about October 12th, they were instructed to ship first instalment also to S. H. Green & Son. On November 2nd, these instructions were revoked until further notice. In the meantime, however, on October 25th, 1907, an invoice of 79,771 yards had been shipped as ordered to S. H. Green & Son. Three invoices were ready for shipment, on November 5th, 12th and 20th, respectively, but were held for shipping instructions. On November 22nd, the invoice of November 5th, 65,920 yards, was ordered shipped to the U. S. Finishing Co., Pawtucket, R. I., and arrived there about December 5th. On the 27th, the invoice of November 12th, 51,462 yards was also ordered to Providence, R. I., and was received in the print mill on December 23, 1907, and on the 27th also the invoice of November

Md.]

Opinion of the Court.

20th, 62,756 yards, was ordered shipped to Pawtucket and was received and put into process about December 13th. Prior to December 23rd, 1907, when defendants cancelled the contract, a fifth instalment had been invoiced to defendants, but never left Augusta, for want of shipping instructions. The record of goods invoiced therefore stands thus:

- "(1) Oct. 25th, 1907, 79,771 yds. \$4,592.82, shipped Oct. 25th to S. H. Green & Son.
- (2) Nov. 5th, 1907, 65,920 yds. \$3,795.34, shipped Nov. 25th to U. S. Finishing Co.
- (3) Nov. 12th, 1907, 51,462 yds. \$2,962.92, shipped Nov. 30th to U. S. Finishing Co.
- (4) Nov. 20th, 1907, 62,756 yds. \$3,613.18, shipped Nov. 30th to U. S. Finishing Co.
- (5) Nov. 30th, 1907, 90,286 yds. \$5,198.22, never left Augusta."

The second, third and fourth instalments were converted and have been paid for. The first was never converted and was held subject to plaintiff's disposal, and the fifth remaining at Augusta was embraced in the cancellation.

There was never any complaint as to the grade of the goods, viz.: "Plain sheetings, soft-twisted yarns"—none as to the number of strands to the square inch either in the warps or in the filling—none as to the width of the sheeting, nor as to the number of yards to the pound—none as to the making up in double cuts. It is conceded that the contract in question called for what are known as "firsts" in the trade, "seconds" never being deliverable unless specified in the contract. They not only sell for less than "firsts" but they are unfit for converting and for making shirts, and are never used for that purpose.

But in weaving such goods as those in question various imperfections sometimes occur. These imperfections are variously described in the testimony as "run threads," or

"drop threads," "thick and thin places," "misweaves," "knotted filling," "scratch ups," "holes" and "oil stains." A drop thread is a broken thread not caught up, and leaving a vacancy in the cloth. "Thick and thin places" speak for themselves, places where the uniformity of the body of the cloth is not preserved and the goods are humpy and uneven. These may all be classed as misweaves generally. "Knotted filling" leaves kinks in the cloth. "Scratch ups" is one of the most serious defects and is described by Mr. Verdery, the plaintiff's president, to be "a break of several threads and the weaver tries to pull them together again with a little comb." He said that was one of the most serious defects when the goods go to the bleachery for printing; that two or three such "scratch ups" in a piece of 50 or 60 yards would justify throwing it out as "seconds;" and that this was true also of misweaves, loose threads, thick and thin places, and oil stains.

Otis G. Lynch, a former superintendent of the plaintiff testified that "scratch ups" ought not to be found in "firsts," and if found in any quantities the goods were "seconds;" that there was no fixed percentage of defects which would render goods "seconds," and that "the mills were not expected to put up any bad goods."

For the protection both of the manufacturer and the purchaser, and especially where the goods are for conversion, a careful system of inspection for defects in these grey goods is necessary at the mills when and as they are made, and according to all the testimony, when the goods are to go to a converter from the manufacturer, this is the only inspection practicable; the converter never makes an inspection before processing the goods, unless specially ordered by the purchaser, or unless upon opening the bales, defects are discovered so numerous and serious as to require notice to be given to the purchaser. The mills provide inspectors for that purpose. When the goods come from the looms, they go

Md.]

Opinion of the Court.

to the brusher, and from him to the measurer, and they are made into cuts, single or double as may be required. The bolts are then placed on a table, opened and turned over, examined yard by yard, separating them into "firsts," and "seconds;" the "firsts" going all into one pile, and the "seconds" all into another pile. If they are to be branded they then go to the branding room; if not, they are put up at once. They are then weighed on the scales, and are folded by a machine in the same room, and are numbered. "Firsts" and "seconds" cannot be intermingled unless the inspector has been negligent in his duty. If the mill is able to make first class goods, all depends upon the accuracy of the inspector. The defects in grey goods are magnified in processing, and depreciate the value of the finished goods very greatly. When grey goods are shipped by purchasers to the print mills they are stored in bales just as they arrive until they are ordered into process, whether for a month, or a year, or two years.

The first invoice reached the print mills about November 11th, 1907, but were never ordered into process. Two of the bales in that invoice were subsequently sent to Baltimore for examination, after the cancellation, as were 103 pieces out of other bales but the rest of this invoice remains at the print mill subject to the plaintiff's order. The second invoice arrived at the print mill about December 5th, 1907, had already been ordered into process, and were put in process soon after their arrival. The third and fourth invoices were shipped from Augusta about November 30th, 1907. Both had been ordered into process, and were put in process soon after their arrival. The fourth was received about December 13th, 1907, and the third on December 23, 1907, or possibly a day or two earlier but were put in process on the 23rd, inst. The fifth invoice, as heretofore noted, never left Augusta, and remains subject to plaintiff's order.

On December 23rd, defendants cancelled the contract for the defects alleged to have been just discovered in the goods,

and on that day called up the print mills and learned the goods in the second, third and fourth invoices had all gone into process.

It would serve no useful purpose to go in detail into the evidence as to the existence of the alleged defects in the goods delivered under the contract. The integrity of none of the witnesses is fairly open to question, and their testimony throughout is characterized by caution and frankness.

Such witnesses for the plaintiff as Mr. Verdery, Mr. Lynch, Mr. Donohue, Mr. Gerald, Mr. Fish and others, all acknowledged experts, and most of them disinterested, testified that they inspected large quantities of the goods manufactured for defendants, *but not delivered*, and found them all to be "Firsts." But it was from the *goods alone that were actually delivered* that the defendants could judge of their course in regard to cancelling the contract, and it is from the evidence as to those goods alone that we must reach our conclusion upon that question.

During the course of the trial, large quantities of the grey goods unprocessed, from the first shipment, and also from five bales of the third shipment which were inadvertently omitted when the rest of that shipment was put in process, as well as large quantities of finished goods from the second and fourth shipments were examined by both plaintiff's and defendants' witnesses. Elaborate tabulations were made by defendants' expert witnesses of the various defects found in these goods showing the average number of specific defects to each piece examined, misweaves ranging as high as 45 in 129 pieces, thick fillings as high as 30, thick and thin places as high as 22, knotted fillings as high as 6, holes as high as 3. In another lot of grey goods "scratch ups" ranged from 7 to 1 per piece. These will suffice as illustrations, and it was admitted by Mr. Verdery, the plaintiff's president, and testified by Mr. Summerfield Baldwin, Jr., one of plaintiff's witnesses, that none of the four shipments thus examined complied with the contract.

Md.]

Opinion of the Court.

Upon this state of facts two questions arise:

(1) Did the failure of the plaintiff to deliver "Firsts" as required by the contract give the defendants the right to rescind the entire contract; and,

(2) If such right of rescission resulted from the plaintiff's breach of contract in the delivery of the four instalments actually made, was the right of rescission lost by reason of the use made of the goods by the defendants in the second, third and fourth shipments, or by any other act on their part?

The first of these questions must be regarded as settled in this State. The sale in this case was of a certain described article, "Plain Sheetings—Soft-twisted yarns;" an article known in the trade as "Firsts;" a different article from that known in the trade as "Seconds," and known by the vendor to be designed for a use to which "Seconds" cannot be put.

In *Columbian Iron Works v. Douglas*, 84 Md. 64, CHIEF JUDGE McSHERRY said: "If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article. * * * It can make no possible difference whether the failure of the plaintiff to secure what he contracted for, grew out of the fraud of the defendant, or out of an accident unmixed with bad faith."

In *Pope v. Allis*, 115 U. S. 363, the Supreme Court said: "When the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing, or ascertained, possess certain qualities, is not a *mere warranty*, but a *condition*, the performance of which is precedent to any obligation upon the vendee under the contract; because, the existence of these qualities, being part of the description of the things sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

In *Norrington v. Wright*, 115 U. S. 188, recognized as a leading case in this country, the Supreme Court held that in a contract for the sale and purchase of 5,000 tons of iron rails, with subsidiary provisions for shipments in different months, and for payment upon each delivery, the seller's failure to ship the required quantity the first month, gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed all the goods should have been delivered at once, and that case has been approved and followed in *Salmon v. Boykin*, 66th Md. 550, and in later cases in this Court.

The principle involved in *Norrington v. Wright*, *supra*, has been recognized and applied in *McGrath v. Gegner*, 77 Md. 331, *Balto. City v. Schaub*, 96 Md. 534, and *Webster v. Moore*, 108 Md. 595. In each of these cases it was held that under contracts providing for monthly deliveries and monthly payments, a vendor could rescind the contract for non-payment for any one instalment or delivery. In the last case the buyer had paid for the first two instalments, but refused to pay for the third instalment, alleging that goods inferior to those described in the contract had been delivered in all three shipments, and it was held that the seller had a right, on such refusal to pay, to rescind the contract as to future deliveries.

It is quite clear upon principle that there can be no valid distinction between the exercise of the right of rescission by the vendor for the failure of the vendee to pay for an instalment delivered, and the exercise of the same right by the vendee upon failure of the vendor to deliver an instalment of goods conforming to the article described in the contract. Mutuality is an essential ingredient of the law of contract, unless expressly excluded, and if this right is more valuable in one than in the other of the two above supposed instances, it is in the latter rather than in the former.

This doctrine is applicable to failure in delivery of, or payment for, any instalment under the contract, whether the

Md.]

Opinion of the Court.

first, or any later one, the rights of the parties being the same as to any unperformed part of the contract, as if that part had been the whole contract. *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 264; *Pakas v. Hollingshead*, 184 N. Y., 24; 3 L. R. A., N. S., 1042.

The right of rescission sought to be exercised by the defendants was an incident of the contract under the facts in this case.

(2) Did the defendants lose this right by any act or conduct of theirs, either by the use of the goods delivered under the second, third and fourth shipments, or otherwise?

It has not been lost unless it has been waived intentionally, for in this case we have discovered no element of estoppel which would produce the same result as waiver. The contract required the plaintiff to pay the freight to the print mills. The goods in the first shipment which went to the mills, but were never processed, have always, since rescission, been subject to plaintiff's order, while those in the fifth invoice, which never left Augusta, have always been in their control and possession. The second, third and fourth shipments, which were put in process, have been paid for at the full contract price as "firsts," when they were in fact "seconds," and the plaintiff had been benefited instead of injured thereby. It was not induced to continue manufacturing goods under the contract, to its detriment, and did so at its own risk after notice of cancellation. It cannot be contended, as in *Delamater v. Chappell*, 48 Md. 253, that the use of the goods in the second, third and fourth shipments was an acceptance, indicating a waiver of the right to rescind. The circumstances of the two cases are radically different and forbid such an inference. The evidence in the case is conclusive that the only inspection made in such cases is that made by the plaintiff at its mill, and that the defendants had the right to rely upon that inspection until they were made acquainted by the print mill, as the result of pro-

cessing the goods, with the defects of which they had neither previous knowledge nor means of knowledge.

In 29 *A. & E. Enc. L.* 1091 waiver is defined as follows: "A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. A waiver, strictly so called, is the result of an intentional relinquishment of a known right."

In *Norrington v. Wright*, *supra*, the plaintiff instead of shipping 1,000 tons in February, and 1,000 tons in March, as stipulated in the contract, shipped 400 tons in February and 855 in March. "The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities shipped in February and March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without knowledge, or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties."

In *Pope v. King*, 108 Md. 46, JUDGE BRISCOE called attention to the fact that the use of a building erected under a contract on the owner's land under circumstances which negative the intention of the owner to accept the work, does not constitute an acceptance of the work; and the analogy between that case and the present is too obvious to require explanation. Acquisition of title to the thing used, does not necessarily imply acceptance under a contract, of work performed on the thing used, where the use is not inconsistent with non-acceptance.

No good could be accomplished by consuming time in minute examination of the evidence as to prompt action on the part of the defendants after discovery of the alleged defects.

Md.]

Syllabus.

Under all the circumstances of this case, we are of opinion that the defendants acted with reasonable promptitude after discovering the defects, and that such abstention as appears from immediate action, is properly attributable to a due regard for the rights of the plaintiff, and a purpose to be as fully as possible correctly informed, before actual cancellation of the contract.

Finding no error in the rulings of the learned Court below the judgment will be affirmed.

Judgment affirmed with costs to the appellees above and below.

THE SUMWALT ICE AND COAL COMPANY *vs.* THE KNICKERBOCKER ICE COMPANY.

Interference With Contract Between Third Parties—Liability of Party Inducing a Person to Commit Breach of Contract to That Person—Evidence—Instructions.

The person who unlawfully or maliciously causes one of the parties to a contract to break it is liable in damages to the person who is thus made to break his contract for the loss he suffers in consequence of such unlawful act.

In an action to recover damages suffered by the party who was compelled by the threats of the defendant to break his contract with a third person, it is no defense that he was also a wrongdoer by breaking his contract, and that by the suit he is seeking to take advantage of his own wrong.

Plaintiff, a dealer in ice, made a contract with the defendant company, an ice manufacturer, for the purchase of ice for two years, at a varying scale of prices. Those for the months from June to October, 1908, were \$2.25 per ton. Each party agreed not to sell to, or interfere with, the cus-

tomers of the other. In June, 1908, plaintiff made a contract with a dairy company to sell to it ice at \$5.00 per ton. The defendant company then notified the plaintiff not to sell to the dairy company, which was not a customer of the defendant, and threatened that if plaintiff did so defendant would not supply in the future. There was at that time a scarcity of ice, so that plaintiff could not obtain a supply except from the defendant. In consequence of this notice and threat, the plaintiff was obliged to break his contract with the dairy company, and the defendant sold ice directly to the dairy at \$5.00 per ton, and the plaintiff lost the profit he would have made under his contract with the dairy company. In an action to recover damages for the loss so occasioned, *held*, that the notice and threat of the defendant company, which obliged the plaintiff to refrain from carrying out his contract with the dairy, was an unlawful act causing the damage to the plaintiff for which he is entitled to recover.

Held, further, that the fact that the plaintiff could have bought ice from other persons does not defeat his right to maintain the action; nor is the plaintiff a joint tortfeasor with the defendant.

In such action, evidence is admissible to prove the contract between the plaintiff and the dairy company.

The testimony of a witness as to what a certain person said to him is hearsay.

Evidence of the declarations of a party made more than six months after the commission of the wrong complained of are not part of the *res gestæ*.

A prayer instructing the jury that "under the pleadings and evidence in the case" the plaintiff is not entitled to recover does not raise the question of the legal sufficiency of the evidence, but relates to the sufficiency of the declaration.

Decided January 11th, 1911.

Appeal from the Baltimore City Court (ELLIOTT, J.).

Md.]

Argument of Counsel

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Wm. S. Bryan, Jr., and E. Allan Sauerwein, Jr., (with whom was Victor I. Cook on the brief), for the appellant.

This Court has repeatedly held that one who wrongfully interfered with the contractual relations existing between two parties, by procuring the breach of the contract by one of the parties to the injury of the other is responsible in damages to the party injured. *Lucke's case*, 77 Md. 396; *Gore v. Condon*, 87 Md. 368. In *Gardiner Dairy Co. v. Knickerbocker Ice Co.*, 107 Md. 556, the Court, upon the same state of facts, held the appellee liable to the Gardiner Dairy Co. for the loss and damage it sustained.

It, therefore, stands to reason that the Dairy Company could have recovered against this appellant, as a co-tort feasor with the appellee, and if the appellant was a free-will agent in so becoming a co-tort feasor, it could, of course, have no contribution from its partner in the wrong.

On the other hand, if the appellant did not act voluntarily in the transaction, but as the result of threats and intimidations made by the appellee, amounting to duress, then the appellee cannot be heard to say that the appellant is a co-tort feasor with it; for to do so would be taking advantage of its own wrong.

That the appellant's conduct was occasioned by duress is too apparent to admit of any doubt. The record establishes, without contradiction, that the carrying into effect of the appellee's threat would have worked a complete annihilation of a business which had taken years to build. In *Moore v. Putts*, 110 Md. 490, this Court said that the exaction of a contract under penalty of refusal to deliver certain insurance policies amounts to duress.

To better emphasize the distinction we draw, let us illustrate. If A and B assault C, C may recover against both A

and B, and if he have satisfaction out of B alone, B cannot require A to contribute; but if the assault was committed by reason of A holding a pistol to the head of B and threatening to shoot him if he did not then and there assault C, C could recover against both A and B; but, if he had satisfaction of B alone, B would have the right to recover from A all that he had paid C. For as between A and B, it cannot be said that B was guilty of an assault upon C any more than it could be said that any other individual is guilty of an act occasioned by threat and intimidation amounting to duress.

But the right to recover can be sustained upon yet another ground, for if we take the same illustration B can recover from A for the wrong which A has done to B in threatening and intimidating him, for certainly such conduct on his part is a wrong against B, and there can be no wrong without a remedy. In the case at bar, this Court has already held, as we have seen, that the action of the appellee did constitute a wrong against the appellant; and the result of that act in damage to the appellant is wholly separate and distinct from its result in damage to the Dairy Co., and therefore a satisfaction of the latter is not a satisfaction of the former.

The contract, for causing the breach of which this action was brought, is undoubtedly relevant and admissible.

In granting the motion of the defendant to strike out the testimony of Mr. Gardiner about what he said to the Sumwalt Company, which action forms the ground for the first exception, the Court said: "It is not strictly admissible; it is a conversation that he had with the plaintiff company out of the presence of the defendant company." This we contend was error. It is true that no self-serving declaration is admissible unless it is made in the presence of the other party, under circumstances which call for the same action or statement on his part. *Nusbaum v. Thompson*, 11 Md. 557; *Leffler v. Allard*, 18 Md. 545, 552; *Friend v. Hammill*, 34 Md. 298.

Md.]

Argument of Counsel.

But we are not here dealing with declarations, self-serving or otherwise. This is a conversation between two parties, one of whom was then on the stand and the other was later placed thereon, and the offer was made to prove what took place at the time. We submit, therefore, that the reason given by the Court was erroneous.

J. Leiper Winslow and Edward C. Carrington, Jr., for the appellee.

The Sumwalt Ice and Coal Company, in this case, seeks to hold the Knickerbocker Ice Company liable in tort for causing it to commit the wrong against the Gardiner Company. Its effort is to place a premium on its own wrongdoing. The evidence shows that the Sumwalt Ice and Coal Company made no effort to get ice with which to supply the Gardiner Dairy Company, but that when it was informed that it could obtain no further ice from the Knickerbocker Ice Company that it immediately acquiesced in the demand of the Knickerbocker Ice Company that it desist from further supplying ice to the Gardiner Dairy Company, and continued to purchase ice from the Knickerbocker Ice Company down to the expiration of the contract, April 1st, 1908, a year and a half after the Knickerbocker Ice Company required the Sumwalt Ice and Coal Company to stop selling ice to the Gardiner Dairy Company.

The Gardiner Dairy Company was left to shift for itself and find a means of supplying its requirements as best it could. This was an unlawful act on the part of the Sumwalt Ice and Coal Company, the appellant. For procuring the commission of this wrongful act, the appellee, the Knickerbocker Ice Company, was held by this Court answerable in damages to the Gardiner Dairy Company. 107 Md. 564.

None of the numerous cases reviewed by this Court in the Gardiner Dairy Company case throw out any hint or suggestion that the party that is induced to break the contract

himself has a remedy against the party who induces him to commit the wrong.

If a wrong were done, and this Court has decided that a wrong was done in the Gardiner Dairy Company matter, then the wrong done it was a breach on the part of the Sumwalt Ice and Coal Company of its contract to deliver it ice during the summer of 1906.

The Sumwalt Ice and Coal Company is *in pari delicto*. *Riggs v. Palmer*, 115 N. Y. 506; compare *Owens v. Owens*, 100 N. C. 240.

In all matters involving interference with contracts, or other relations, the remedy flows to the third party injuriously affected by the unjustifiable interference.

Taking *Lumley v. Gye*, 2 El. and B. 216, as an illustration: We have never heard it seriously contended that the opera singer herself had a cause of action against him who induced her to commit the wrong of breaking her first contract. If unlawful means were resorted to to induce her to break such contract, then she would have had a remedy—not for breaking her contract, but as a remedy for the unlawful means adopted by him who induced her to break the contract.

There was a tame acquiescence on the part of the Sumwalt Ice and Coal Company to the demand of the Knickerbocker Ice Company, that it drop the Gardiner Dairy Company as a customer and cease furnishing it ice. This acquiescence was born of the very large commercial advantages to the Sumwalt Ice and Coal Company by virtue of the contract of March 19, 1906, under which contract the Sumwalt Ice and Coal Company continued to purchase ice of the Knickerbocker Ice Company down to April 1st, 1908. In other words, it was induced and persuaded that it was better to keep the good will of the Knickerbocker Ice Company rather than enter into any contention as to whose customer the Gardiner Dairy was: and the appellant therefore acquiesced in and sanctioned the claim of the Knickerbocker Ice

Md.]

Argument of Counsel.

Company—a claim made in entire good faith—that the Gardiner Dairy Company was its customer.

A suit by the Sumwalt Ice and Coal Company against this appellee for alleged breach of the contract of March 19, 1906, has been heretofore before this Court—*Sumwalt Ice and Coal Company v. Knickerbocker Ice Company*, 112 Md. 437.

As interference with contract was only intended to protect the third party injured, it would be enabling the Sumwalt Ice and Coal Company to take advantage of its own wrong if it were permitted to recover in this case. *Am. & Eng. Enc.*, 1109, Vol. 16, 2nd Ed.

There was no sufficient evidence adduced entitling the case to be submitted to the jury. It must have been made perfectly plain to this Court that this suit and the suit reported in 112 Md.—*Sumwalt Ice and Coal Company v. Knickerbocker Ice Company*—as well as the case reported in 107 Md.—*Knickerbocker Ice Company v. Gardiner Dairy Company*—was the outgrowth of what the Knickerbocker Ice Company believed was the proper assertion of its rights under the contract of March 19th, 1906; that the whole transaction was a fight or contention between the Knickerbocker Ice Company and the Sumwalt Ice and Coal Company as to the propriety of retaining the Gardiner Dairy Company as a customer. It was an honest dispute as to who was entitled to retain the trade of the Gardiner Dairy Company. If the Sumwalt Ice and Coal Company were entitled to retain the trade of the Gardiner Dairy Company and continue serving it ice under its arrangement of June 29, 1906, its rights were protected by its written contract with the Knickerbocker Ice Company upon which it could readily have forced the Knickerbocker Company to have supplied it with the ice it was entitled to and enjoined it from interfering with its customers; and it has been prompt and vigorous in asserting those rights by suing for the recovery for the alleged breach of the contract. It is hardly necessary

for it to resort to an action on the case to afford it a remedy for taking away its customer as its rights are amply protected under the contract of March 19, 1906.

The evidence shows conclusively that the Sumwalt Ice and Coal Company acquiesced in the contention of the Knickerbocker Ice Company, that the Knickerbocker Ice Company was entitled to the trade of the Gardiner Dairy Company. If such contention of the Knickerbocker Ice Company were not well founded, the Sumwalt Ice and Coal Company condoned the conduct of the Knickerbocker Ice Company and was studiously careful in taking all the benefits which flowed from its contract of March 19, 1906, and which had eighteen months to run after the Sumwalt Company was deprived of the trade of the Dairy Company.

BURKE, J., delivered the opinion of the Court.

This is the plaintiff's appeal from a judgment in favor of the defendant entered in the Baltimore City Court. The plaintiff is a foreign corporation engaged in the wholesale and retail ice business in Maryland, and the defendant corporation is a manufacturer of ice, and engaged in the wholesale distribution of both natural and artificial ice in Baltimore City and elsewhere. The plaintiff is not a manufacturer of ice; but depends upon its purchase from others to supply its customers.

On the 19th day of March, 1906, the plaintiff entered into an agreement with the defendant whereby it agreed to purchase from it and the defendant agreed to sell to the plaintiff such quantities of ice as the plaintiff would require in its business from the 1st day of April, 1906, to the 1st day of April, 1908, at prices for each month specified in the contract. The platform prices for the month of June, July, August and September, 1906, were \$2.25 per ton. The contract contains three other provisions, or conditions which must be considered on this appeal. First, the plaintiff agreed that it would not directly or indirectly either in the pur-

Md.]

Opinion of the Court.

chase or sale of ice deal with the American Ice Company, the Independent Ice Company, the Baltimore Heating and Refrigerating Company, the Crystal Ice Company, the Buena Vista Ice Company, or the Vacuum Ice Company, or any other persons, firm or corporation similarly engaged, or hereafter to be formed during the term of this contract, for the purpose of manufacturing ice, in competition with the defendant, or in handling, in such wise, the natural product of ice; but this clause, it was agreed, was not to be so construed as to prevent the plaintiff from extending its business of serving ice as then conducted by it; secondly, that the plaintiff would not directly or indirectly *sell to or interfere with the customers or trade of the defendant*; that the defendant would not either of itself or through any person or persons natural or artificial and under its control, sell to the customers of the plaintiff, *or do anything to interfere with, injure, or divert in anywise the business of the plaintiff*.

On June 29, 1906, an agreement was entered into between the plaintiff and the Gardiner Dairy Company, a corporation, whereby the plaintiff agreed to sell and deliver to that company, and it thereby agreed to take from the plaintiff such ice as it should require in its business, at the price of \$5 per ton delivered in amounts not to exceed twenty tons of ice per day from the date of the agreement and until the Gardiner Company should complete its own ice manufacturing plant then in course of construction.

The declaration in this case sets out the facts which we have stated and which are established by the evidence. It then alleges "that the defendant in utter disregard of the rights of the plaintiff and of its contractual obligations to the plaintiff did wrongfully, improperly, and maliciously notify the said plaintiff to desist from selling ice to the said Gardiner Dairy Company of Baltimore City, and to disregard and break the said agreement so entered into between the said plaintiff and the said Gardiner Dairy Company of Baltimore City, and did wrongfully, improperly and maliciously

threaten the said plaintiff that if it did not so desist and so ignore and violate its said agreement that it, the said defendant, would refuse to sell and deliver to said plaintiff any more ice under its said agreement with the said plaintiff. And the plaintiff further says that at the time of the issuance of this threat by the said defendant body corporate there was a great scarcity of ice not only in the City of Baltimore, but throughout the Middle Atlantic States generally, and the plaintiff being apprehensive that if it did not comply with the wishes of the said defendant body corporate and if the said defendant should carry out its threat, the entire business of the plaintiff would be thereby ruined, did notify the said Gardiner Dairy Company that it would break its said agreement and of the reason therefor, and thereupon the said Gardiner Dairy Company being unable to secure ice elsewhere did enter into an agreement with the defendant body corporate to purchase of it five hundred tons of ice at the price of five dollars (\$5.00) per ton at the platform of the defendant body corporate, under which agreement the said Gardiner Dairy Company did actually purchase four hundred and eighty-seven and a fraction tons." The declaration further alleges "that the action of the said defendant in causing the plaintiff to break the said contract with the said Gardiner Dairy Company of Baltimore City was with the desire and intent on the part of the said defendant to injure the said plaintiff and to obtain a benefit for itself by selling four hundred and eighty-seven and a fraction tons of ice at five dollars (\$5.00) per ton at its platform to the Gardiner Dairy Company of Baltimore City rather than at the price of two dollars and fifty cents per ton, which was the prevailing price at that time to the plaintiff, by which unlawful and malicious action on the part of said defendant the plaintiff has been greatly damaged."

During the course of the trial in the lower Court nine exceptions to rulings upon questions of evidence were reserved by the plaintiff, and at the conclusion of its case the Court

Md.]

Opinion of the Court.

instructed the jury that "under the pleadings and upon the evidence" in the case the plaintiff was not entitled to recover, and that the verdict of the jury must be for the defendant. This ruling constitutes the tenth exception. It raises no question as to the legal sufficiency of the evidence introduced in support of the plaintiff's case. As to that the prayer is too general and indefinite, and in the form in which it was granted must be treated only as an attack upon the sufficiency of the declaration. Under a prayer referring to the pleadings the legal sufficiency of the declaration may be raised and determined.

Leopard v. Chesapeake & Ohio Canal, 1 Gill, 222; *Baltimore City Passenger Railroad Company v. Wilkinson*, 30 Md. 229; *Ward v. Schlosser*, 111 Md. 528.

We have no doubt that the declaration sets out a legal cause of action. The facts alleged disclose an actionable tort committed by the defendant upon the rights of the plaintiff resulting directly in substantial damage to it. In *Acker, Merrill & Condit Co. v. Magraw*, 106 Md. 551, we said: "A person commits a tort, and renders himself liable to an action for damages, who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such an act or omission either infringes some absolute right, to the uninterrupted enjoyment of which another is entitled, or cause to such other some substantial loss of money, health or material comfort, beyond that suffered by the rest of the public. *Moak's Underhill on Torts*, 4. The two essential elements, therefore, necessary to sustain the action are: (1) A wrongful act or omission of duty by the defendant; and (2) damage or loss to the plaintiff in consequence of such act or omission."

The plaintiff had a right to carry on its business under the contract with the Gardiner Dairy Company, and it was the legal duty of the defendant to refrain from the use of intimidation, force, coercion, threats, or any other illegal means with a view of preventing it from doing so, and if with the

purpose and by the means stated in the declaration it prevented the plaintiff from fulfilling its contract, with the Dairy Company and thereby the plaintiff was damaged as alleged, the defendant's liability for such damage or loss cannot be seriously doubted.

The gist of the action is the wrongful and unlawful interference with the business relations of the plaintiff by the means and for the object alleged.

It would serve no useful purpose to review the great number of English and American cases which deal with the subject of the unlawful interference with contract or trade relations.

In *Knickerbocker Ice Company v. Gardiner Dairy Company*, 107 Md. 556, the subject of interference with contract relations is fully discussed, and many cases bearing upon the question, and also upon the subject of the unlawful interference with the plaintiff's trade, or business, or employment are referred to and considered. As to the latter subject the authorities both in England and America have established the proposition that any unlawful or wrongful interference by A with the liberty of B to pursue his lawful trade, business, or calling whereby B suffers damage is actionable, and he can maintain an action against A for such interference, and this is so whether A acts alone, or in concert or combination with many.

Under such circumstances each is a tortfeasor. This is the central idea or underlying principle of all cases. In many of the cases the element of combination or conspiracy is found. If the act be lawful the combination or conspiracy to commit it does not make the act unlawful; if it be unlawful the combination to commit it may render its commission easier and may aggravate the injury; but it does not change the character of the act. The fact of combination is treated by the Courts as of great evidentiary value in deciding the question of coercion or duress. In *Giblan v. National Laborers' Union*, 2 K. B. 600 (1903), it appeared that two

Md.]

Opinion of the Court.

officers of the Union had caused the plaintiff to be discharged from one place of employment after another because of his refusal to pay a certain debt to a Union from which he had been expelled. This the defendants were able to do by means of threats and coercion exercised upon the employer. It was held that the plaintiff might recover, ROMER, L. J., saying: "But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing and succeeds in preventing a man from obtaining or holding employment in his calling to his injury by reason of threats to, or special influence upon a man's employers, or would be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered."

In that case the threats were against the employer whereby Giblan was prevented from selling his labor; in this case the threats and coercion were made to and directly exercised upon the plaintiff whereby he was prevented, under the circumstances alleged in the declaration, from selling ice to the Dairy Company and no good reason can be found or distinction made why the same legal principle should not be applied to both cases. The acts done in each instance are torts resulting in damage to the plaintiff. To admit a recovery in the first case, and deny it in the second would be both unjust and unreasonable. No authority was cited for such a distinction, and we do not think that any can be found. Such a distinction would leave one who has suffered an injury without a remedy for the tort.

JUDGE BOYD, in *Knickerbocker Ice Company v. Gardiner Dairy Company*, *supra*, said: "It is not altogether easy to

lay down general rules as established by the cases, but some principles are quite well settled by them. It may be safely said that if wrongful, or unlawful means are employed to induce a breach of a contract, and injury ensues, the party so causing the breach is liable in an action of tort. While lawful competition must be sustained and encouraged by the law it is not lawful in order to procure a benefit for himself for one person to wrongfully force a party to an existing contract to break it, and a threat to do an act which would seriously cripple, if not ruin, such party, unless he does break it, is equivalent to force, as that term is used in this connection."

It is contended that the plaintiff cannot recover, because it is *in pari delicto* with the defendant in breaking the contract with the Gardiner Dairy Company, and that to allow a recovery would be to permit the plaintiff to take advantage of its own wrong. In the recent case of the *Baltimore & Ohio Railroad Company v. The County Commissioners of Howard County*, 113 Md. 404, we had an occasion to consider this subject, and to state the conditions under which a recovery would be denied under the principle here invoked. We need only refer to what was there said to show that that principle has no application to this case. Both the declaration and the evidence show that the plaintiff and defendant were not equally guilty in breaking the contract with the Dairy Company. The act of the plaintiff was not voluntary; but was the result of threat made by the defendant. Under such circumstances the rule contended for does not apply. It was held in the *Knickerbocker case, supra*, that the Gardiner Dairy Company was not a customer of the defendant within the meaning of the second condition, quoted above, of the contract of March, 1906. It was, of course the duty of the plaintiff to minimize the damage resulting from the acts of the defendant. 13 *Cyc.* 71; *Lang v. Wagner*, 52 Md. 310; *Sparrows Point Railroad Company v. Hackett*, 87 Md. 234; but by the first condition of the contract mentioned the

Md.]

Opinion of the Court.

plaintiff was under an obligation not to buy ice from other sources. But assuming, *ex gratia*, that it might have lessened the damages by buying ice from others its failure to do so would not have *defeated* its right of recovery. And to have bought ice from others to supply the Dairy Company in the situation in which the plaintiff was placed might have resulted in the ruin of its business.

We are, therefore, of opinion that there was error in granting the defendant's first prayer withdrawing the case from the jury.

The rulings on the evidence will now be briefly noticed. There was error in striking out the testimony of Mr. Gardiner, admitted subject to exceptions, to prove the contract of June 29, 1906, alleged in the declaration, between the plaintiff and the Gardiner Company. This evidence was relevant and important, and tended to support a material averment of the declaration; but no substantial injury appears to have been done as Mr. Gardiner was subsequently permitted to prove the contract. We find no error in the second and third exceptions wherein the Court refused to allow Mr. Gardiner to state the reasons given by Mr. Hammond why the plaintiff could not supply ice to the Gardiner Company. This was clearly hearsay. Mr. Hammond was afterwards called, and testified upon this point. The proffer of evidence in the fourth exception was properly refused for the same reason, nor does it appear by the record to have been relevant. There was no reversible error in the fifth and sixth exceptions, as the plaintiff got the benefit of the evidence in the subsequent testimony of the witness. There was error in the seventh and eighth exceptions. The facts sought to be proved were relevant, and the witnesses were competent to testify as to them. The declarations of Mr. Kirkpatrick, made more than six months or a year after the commission of the wrong complained of, were too remote and were properly excluded.

In the form in which the prayer was granted the question of the legal sufficiency of the evidence actually admitted was not raised and it has not been fully discussed; but we have examined it carefully, and as the case must be remanded for a new trial, it is proper to say that the evidence admitted, if believed by the jury, was legally sufficient to support the plaintiff's case.

Judgment reversed, a new trial awarded with costs to the appellant above and below.

CHARLES W. SLAGLE, JR., ET AL., TRUSTEES, vs.
J. WATERS RUSSELL.

Real Estate Broker Not Entitled to Commissions When He is Interested in the Purchase Made—Sufficiency of Evidence to Show That Broker Was the Procuring Cause of Sale—Sale by Owner Not Aware That Purchaser Had Been Procured by Broker—Employment of Two Brokers—Lapse of Time as Affecting Broker's Authority—Revocation of Employment.

A real estate broker employed to sell land who has himself an interest in the purchase is not entitled to recover commissions on such a sale unless the vendor knew that the broker was purchasing in part for himself and assented to the arrangement. The duty of the broker as agent of the vendor is to obtain the highest price and his personal interest as a purchaser is to buy at the lowest price. He cannot be allowed compensation for his services in effecting a sale when there is such a conflict between his duty as an agent and his personal interest as purchaser.

Md.]

Syllabus.

Plaintiff sued to recover commissions on the sale by defendants of a farm to one C. The defendants did not know at the time that C. had been procured as a purchaser by the plaintiff. Some months before the sale, the defendants had authorized plaintiff to obtain an offer for the property. Plaintiff's evidence was that he had first called C.'s attention to the farm and asked him to buy it, and afterwards said that if C. so wished he would unite with him in making the purchase. The defendant's evidence was that the plaintiff's proposition to C. was that they should buy the farm together, and that this was not agreed to by C., who some time afterwards bought the farm directly from the defendants. *Held*, that, assuming that the plaintiff was the procuring cause of the sale, if it be found as a fact by the jury that the plaintiff called C.'s attention to the farm by the proposition that they should buy the same on joint account, the plaintiff is no more entitled to commissions on the sale afterwards made to C. alone than he would be if the sale had been made to them jointly.

Held, further, that the evidence in the case is legally sufficient to show that plaintiff's proposition to C. was not essentially that they should become joint purchasers, and also to show that the plaintiff was the procuring cause of the sale afterwards made, and that these questions should have been submitted to the jury under instructions in connection with the defendant's evidence.

If a broker who has been authorized to obtain a purchaser for land is the procuring cause of the sale afterwards made because he first called the attention of the purchaser to the property, he is entitled to commissions on the sale, although the vendor did not know that the purchaser to whom he sold had been procured by the efforts of the broker.

If the owner of the land has employed two brokers and one of them produces a purchaser, and the owner, having no knowledge or notice that the other broker really procured that purchaser, pays in good faith the commissions to the one so producing him, he will not be required to pay commissions also to the other broker.

When a broker empowered to sell a farm becomes the procuring cause of a sale made five months after his employment, the offer to him will not be held, as matter of law, to have lapsed by efflux of time, so that his acceptance, by performing the services contemplated, comes too late to make a contract entitling him to commissions.

After negotiations begun through a broker's intervention have virtually culminated in a sale, he cannot be discharged so as to deprive him of his commissions when he was thus the procuring cause of the sale made.

Decided January 11th, 1911.

Appeal from the Superior Court of Baltimore City (SHARP, J.).

Defendants' Third Prayer.—That under the pleadings and evidence in this case, the jury are not entitled to take into consideration any alleged interviews or verbal agreements or understandings between the plaintiff and the defendants, prior to the letter of January 27, 1909, from plaintiff to defendants. (*Refused.*)

Defendants' Seventh Prayer.—Even if the jury find that the plaintiff called the attention of Mr. Cacy to the property and suggested to him, or requested him to purchase it, and even if Cacy took the matter under consideration yet if Cacy finally told the plaintiff that he, Cacy, could not buy, or did not want to buy, and that the negotiations with Cacy were *bona fide* broken off and abandoned, then under the pleadings in the case the plaintiff is not entitled to recover, even if they find that subsequently Cacy on his own account, and under other influences, opened negotiations with the defendants, which resulted in the sale of the property. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Md.]

Opinion of the Court.

Randolph Barton, Jr., and Aubrey Pearre, Jr., for the appellants.

Clarence W. Perkins (with whom was Chas. P. Coady on the brief), for the appellee.

Boyd, C. J., delivered the opinion of the Court.

The appellee recovered a judgment against the appellants for commissions on a sale of real estate of which he claims to be the procuring cause. He was a licensed real estate broker in Kent County, and called upon Mr. C. W. Slagle in Baltimore the latter part of December, 1908, or the early part of January, 1909, and told him he thought he could find a buyer for the farm held in trust by the appellants. He testified that he told Mr. Slagle that if he was able to find a buyer, his commission would be five per cent., and that "his answer was, 'you go ahead and offer it to your prospective buyers and sell it if you can,' and with that understanding after that conversation, I left his office. Mr. Slagle said they wanted \$20,000 for it. Witness said he thought that was a little high but might be obtained, and Slagle said: 'You make me a proposition for it,' which I afterwards did, his instructions were 'whatever offer you get, submit it to me.'"

On cross-examination he stated he had written on January 27th, 1909, the following letter: "Referring to our conversation regarding farm now occupied by Mr. Hudson, and situate near Gales, will you kindly advise me if you care to sell, as I am in communication with one of my customers who might be interested in this place." To which he received the following reply, dated January 29th, 1909: "In reply to your favor of the 27th will say we will sell the farm situated on Worton Creek, containing about 516 acres, at the rate of \$38 per acre, subject to the tenants' rights." He said he had no other written agreement with Mr. Slagle, and did not see him personally or have any other communication, either

verbal or written, with the Slagle estate, or its representatives, until the end of June, 1909.

Mr. W. H. Cacy of Kent County got a verbal option from Mr. Slagle, for the purchase of the property at \$17,000, in June, 1909, and on the 28th of that month obtained an option in writing, at which time he paid \$250.00. Shortly afterwards Mr. Baukhages told Mr. Cacy he was authorized by Mrs. Costello to offer him \$1,000 advance. He declined that but finally sold it to her for \$23,000, before he got his deed, which is dated September 7th, 1909. It is shown by uncontradicted evidence that the appellants did not know Mrs. Costello in connection with the sale, and Mr. Cacy testified that when he obtained the option he did not know there were such people living as Mrs. Costello and Mr. Baukhages, but the latter afterwards came to him—having been told by Mr. Slagle that he had agreed to sell the farm to Mr. Cacy. He (Mr. Cacy) paid Mr. Baukhages' commissions on this sale to Mrs. Costello.

Mr. Russell contends that he was instrumental in procuring Mr. Cacy as a purchaser and hence is entitled to commissions. Mr. Slagle testified that he did not know that Mr. Russell had ever spoken to Mr. Cacy on the subject, that he had heard nothing whatever from him since January, and never thought of him in connection with the sale. He had not given him an exclusive right to sell, and we do not understand it to be contended that he did not act in perfectly good faith. On June 26, 1909, which was after the verbal option was given by Mr. Slagle to Mr. Cacy, Mr. Russell wrote to the estate of Charles W. Slagle as follows: "About one week ago I wrote you about your Gales Wharf Farm. Will you kindly advise me your lowest cash price, or lowest price for the whole tract, and at what figure would you name for the wharf and the farm tilled by Mr. Hudson. Thanking you for an early reply, I am." etc. He received the following reply, which is dated in the record July 29, but is admitted to have been written on June 29, 1909, "In reply to your

Md.]

Opinion of the Court.

letter of the 26th, would say that we have not received the letter within the last week of which you speak. We would also state that as the whole of Worton Manor Beach Farm is now practically sold we cannot name you a price on any part of it at present."

On July 1st, 1909, Mr. Russell wrote the following letter: "Yours of the 29th at hand. Acting upon our conversation of last spring, together with your letter of several months ago, I submitted your farm to a Mrs. Costello and a Mr. Baukhages of Baltimore, should they be the purchasers to whom you refer, I would expect a commission from the sale, and I write to this effect so that you may not enter into a contract until we clearly understand just what your and my relations are. Of course it is possible that these parties are not considering the purchase, if so, my assumption is inapplicable."

On July 3rd he called up Mr. Slagle by telephone and Mr. Slagle told him that he had sold the farm to Mr. Cacy. On the same day Mr. Russell wrote a letter addressed to the Estate of Charles W. Slagle in which he referred to the conversation with Mr. C. W. Slagle about the first of January, 1909, and to the letters of January 27th and January 29th. He said in this letter that, "In Jan., 1909, I, at Massey Sta., Kent Co., submitted this farm to W. H. Cacy, of Massey, during April, 1909, in Chestertown I again approached Mr. Cacy about this farm, and about three weeks ago, I again talked with him," and he claimed commissions on the sale to Mr. Cacy. In his testimony he said he had some business with Mr. Cacy the latter part of January, and he spoke of the farm to him. He told him they were asking \$20,000 for it. He said "he would consider it, and that was all he said." He saw him again about the first of April, and spoke of it. Cacy said the price was too high, but they talked it over and he told him he thought less than \$20,000 would buy it. Then about the last of April he saw him again, and told him he had talked with others, and he thought it was worth the

money, and insisted upon his further consideration of it. Cacy said he thought the price was a little high and the buildings needed some repairs, but "Well, he said, I will think it over." He did not see Cacy after that, but he was trying to sell the property to different parties. Mr. Russell admitted that he did not make any new proposition in April—"no more than a repetition of my arguments. Same thing in interview in latter part of April in Chestertown."

Cacy testified that when he met Russell about Christmas, 1908, or the first of January, 1909, "Mr. Russell said Worton Manor Farm could be bought, and he said, I will buy it with you, and I think we can make some money on it." He told him he would go with him to look at it. He was asked: "Q. Did he say anything at that interview about your buying it and his not buying it? A. No, sir; not a thing. His proposal was he buy it with me. Q. Is your mind clear on that? A. Yes, sir. Q. That he buy it with you? A. Yes." He said he did not go to see it then, and the next thing that occurred about it was that he met Mr. Russell, he thought in February or March, but was not positive about the date, when "He simply said what about that Worton Manor Beach Farm, you have not been to look at it.' I said, 'I will go with you to look at it some time.'" That was about the substance of what was said. Witness did not go to look at it then. 'Well, I saw Mr. Russell again in Chestertown, I think it was in April, and he mentioned the matter, and I said, Waters I haven't the money, and I gave it up.' At the third interview, Russell said, 'What about the Worton Manor Farm?' 'Well, I said, Waters, I haven't any money, and you will have to count me out.' Meanwhile witness had done nothing about the farm, or been to look at it."

He further testified that some time in June he saw Mr. Perkins (one of the counsel for the plaintiff) on the train and he said if he (Cacy) would buy it he (Perkins) would buy a portion of it, or 50 acres of the farm. He went to

Md.]

Opinion of the Court.

Baltimore, saw Mr. Slagle, and got the option the latter part of June.

Inasmuch as the appellants relied largely on what they claim to have been error in rejecting the sixth and eighth prayers, we will consider them before taking up the other questions involved in this case. The sixth is as follows: "If the jury believe from the evidence that at no time did plaintiff propose to William H. Cacy that he, said Cacy, should buy defendants' farm, but that his proposal always was that plaintiff and Cacy should buy it together, then even if the jury further believe that the purchase of defendants' farm by Cacy was the direct result of the said proposals of the plaintiff, yet under the pleadings and evidence in the case the plaintiff is not entitled to recover." The eighth prayer is: "The defendants pray the Court to instruct the jury that if they find that whenever the plaintiff suggested to Mr. Cacy the purchase of the property in question, it was always with the proposal that he, the plaintiff, and the said Cacy should purchase it together, and at no time with any other proposal, and that plan of purchasing was not known to the defendants, then under the pleadings in the case the plaintiff cannot recover."

The appellee contends that there was not sufficient evidence to support those prayers, and hence they were properly refused, but we think there was unquestionably evidence tending to show that Mr. Russell's proposition to Mr. Cacy was that they should buy the property together. In addition to what we have stated above, Mr. Russell admits that he "knew that Cacy was not a farmer, buying for farm purposes, but as a rule invested in farm properties for the purpose of selling." He further said, "As a matter of fact, I advised Mr. Cacy to buy the farm, thinking it was a good proposition for him to invest in, and urging him, to the extent of telling him, that if he wanted me to, I would go in with him. I did that to strengthen his judgment and opinion as to the value of the farm"—although he also said in answer to the ques-

tion, "So your proposition really was, then, to Mr. Cacy, that you would go in with him and buy this farm?" "No, my primary proposition was for him to buy it. I opened the subject up that way. The second proposition was, if he wanted me to, I would go into it." Mr. Cacy testified, as stated above, and there can be no doubt that according to his evidence, Mr. Russell's proposition to him was that they should buy it together, and Mr. Russell, to some extent, corroborated him. It was, therefore, a question for the jury and those prayers left it to them.

What then is the effect of that action, if Mr. Cacy's theory of what was done is correct? In *Raisin v. Clark*, 41 Md. 158, the appellant was employed by the owner to sell for him a farm in Baltimore County and appellee, seeing the advertisement, called upon the appellant and proposed to exchange a house she owned in the city for the farm, which exchange was effected. The owner paid the appellant the usual commissions, and he sued the appellee to recover like commissions from her. This Court affirmed the judgment denying his right to recover, and, in the course of the opinion, JUDGE MILLER said: "It is a general rule that a party cannot in any agency of this kind act as agent or broker for both vendor and vendee in respect to the same transaction, because in such case there is a necessary conflict between his interest and his duty. The vendor in the employment of an agent to sell his property bargains for the disinterested skill, diligence and zeal of the agent for his own exclusive benefit.

"It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of the principal as far as he lawfully may. The seller of an estate is presumed to be desirous of selling it at as high a price as can fairly be obtained for it, and the purchaser is equally presumed to desire to purchase it for as low a price as he may. The interests of the two are in conflict * * * Hence the law will not permit an agent of the vendor whilst that employment continues, to assume the essentially inconsistent and

Md.]

Opinion of the Court.

repugnant relation of agent for the purchaser." Again he said: "It is perhaps possible for the same agent to serve both parties to such a transaction honestly and faithfully, but it is very difficult to do so, and the temptation to do otherwise is so strong that the law has wisely interposed a positive prohibition to every such attempt."

In *Blake v. Stump*, 72 Md. 172, this Court said: "The principle asserted by the eighth prayer of the defendant is that a broker cannot act for both seller and purchaser without the full knowledge and consent of each, because their interests are in conflict. That is undeniably the law, and has been maintained by this Court, most positively in *Schwartz v. Yearly*, 31 Md. 271, and *Raisin v. Clark*, 41 Md. 159." The eighth prayer spoken of in that opinion was to the effect, that if the jury believed that the plaintiffs were employed by the defendant to effect the sale in question, and that prior to the commencement of the negotiations the purchaser had employed them to procure the property, and the plaintiff in pursuance of that employment commenced to treat with the defendant for the purchase of the property; or if they believed that at any time whilst the plaintiffs were in the employ of the defendants they were in respect to the purchase and sale in any way in the employ or acting as agent of or in the interest of the purchaser, then the plaintiffs were not entitled to recover. That was an action for the recovery of commissions on the theory that the plaintiffs' introduction of the purchaser had been the procuring cause of the sale, and the principle involved in that prayer was very analogous to that in these now under consideration. For if a broker employed by the owner cannot be agent of the purchaser, surely he cannot be the purchaser himself. It is scarcely necessary to cite authorities to that effect, but in 19 *Cyc.* 206, it is said: "Unless the principal is fully advised of the facts, a broker employed to buy property cannot as a rule sell property in which he has an individual interest; nor may a broker employed to sell property become the buyer thereof."

It would be difficult to find a decision in one case more applicable to another than that of *Blake v. Stump* to the one now before us. It was not only a similar suit, but a defense of the same character was made in that case as is made here. The appellee claims to have been the procuring cause of the sale to Cacy, but if it be true that he brought the farm to Cacy's attention (which resulted in his purchase of it) by his effort to induce Cacy to purchase it with him, he cannot be permitted to recover commissions under the principle above announced. It is true that Cacy did not buy it for the appellee and himself, but, if his testimony is correct, the only negotiations the appellee had with him were those in which he had such a personal interest as to preclude him from recovering from the appellants commissions for services rendered them in bringing Cacy to them. The appellee was endeavoring to persuade Cacy to join him in the purchase on the theory that they could make profit out of it by reselling it. He told Cacy the price named by the appellants was \$20,000, but that it was possible he could get some reduction on it. As he was the agent of the appellants, it was his duty not only to get \$20,000 for it, if he could, but to get *all* he could for it, while, if he was to be the purchaser for the whole or only a part his interest was to get it as low as possible. There would therefore be a great conflict between his duty as agent and his interest as purchaser. The law will not permit an agent to be thus tempted, and refuses to reward him for services claimed to have been rendered under such circumstances, unless the owner is made to clearly understand and give his consent to such conditions.

In justice to Mr. Russell it may be said that if Mr. Cacy had consented to join with him and purchase the property, he might have told the appellants that he had an interest in the purchase, or before closing the sale might have obtained their consent to become a purchaser, but the transaction did not go so far as to raise that question. The appellants might or might not have consented to it, but it is not contended that

Md.]

Opinion of the Court.

they did so consent, or knew that the appellee was negotiating with Cacy to purchase it either for himself or with the appellee. Assuming that Cacy's testimony is correct on this point, which we must do in passing on these prayers, and assuming, as the appellee claims, that Cacy became a purchaser through his instrumentality, the fact is that Cacy's attention was brought to the property by reason of the appellee's negotiations with him, which negotiations were based on his, the appellee's, becoming a co-purchaser. If they had resulted in a purchase by or for the two, then unquestionably he would not only not have been entitled to commissions but would have been liable to the appellants for a breach of duty. Suppose for example he and Cacy had purchased the property under those circumstances for \$17,000 and then had sold it in a few weeks to Mrs. Costello for \$23,000, as Cacy did, can it be doubted that the appellants could, on discovering that the appellee had an interest in the purchase, have held him liable? So if it be conceded that the appellee was a procuring cause of the sale, it was the result of such action on his part as the law condemns, and he is in no better position to claim commissions on the sale to Cacy, who was thus brought into the transaction, than he would have been if he and Cacy had become joint purchasers. In order that there be no misunderstanding we repeat what we have in substance intimated, that we do not mean to say that such were the negotiations in fact, as that is for the jury, but only that there was evidence of it, which we, for the purposes of these prayers, must assume to be correct.

The only criticism we would make on the sixth prayer is that it did not, as the eighth did, submit to the jury to find whether the appellants knew of the plan proposed by the appellee to Cacy, but as it is not pretended that they did, or that they had given their consent to it, the appellee could not have been injured by submitting the prayer without such qualification. We are, therefore, of the opinion that there was error in rejecting those two prayers.

As the Court granted the defendants' seventh prayer, we do not think there was reversible error in rejecting the fourth—especially as Mr. Cacy did not say in terms that his conversation with Mr. Perkins was the inducing cause of his purchase. Possibly such an inference might be drawn from what he did say, but as he never mentioned the subject to Mr. Perkins after he did purchase, and as his talk with Mr. Perkins might simply have resulted in causing him to take more prompt action, than Mr. Russell's negotiations had induced him to do, there is not much in the record to found even such an inference upon.

The defendants' special exceptions to the plaintiff's prayers, and the defendants' first and second prayers can be considered together. They are on the theory that there was no legally sufficient evidence to prove that the plaintiff was the procuring cause of the sale. Although such a defense was not relied on by the appellants, we deem it proper to here refer to what seems to be a misapprehension on the part of some as to the law of this State. In *Quist v. Goodfellow*, 90 Minn. 509, which is also reported in 9 *Am. & Eng. An. Cases*, 431, and in 8 *L. R. A. N. S.* 153, it is said: "Some of the authorities hold that a real estate broker is entitled to his stipulated commission where his efforts were in fact the procuring cause of a sale, though made by the owner in good faith and in ignorance of his efforts; but such is not the law of this State. To entitle the broker to a commission in such case, where there is no exclusive agency, it must appear that the owner knew, or from the circumstances ought to have known, that the broker was instrumental in inducing the purchaser to enter into the contract. Such was the rule laid down in *Cathcart v. Bacon*, 47 Minn. 34, 49 N. W. Rep. 331; and it is the law in other States." That learned Court then refers to several decisions, amongst others, *Tinges v. Moale*, 25 Md. 480. In the note in 9 *Am. & Eng. An. Cases*, the author says that the great weight of authority is to the contrary—that "It is generally held that it is suf-

Md.]

Opinion of the Court.

ficient if it appears that the broker was the procuring cause of the sale." He then refers to a large number of cases, and concludes that part of the note by saying: "Some Courts, however, have held that a broker is not entitled to a commission on a sale made by the owner to one with whom the broker has negotiated, if the owner acts in good faith and without knowledge of the negotiations between the broker and such purchaser." He then cites several cases, including *Tinges v. Moale*.

We will not refer to the other cases cited in the opinion or that note, but we do deem it proper to correct the misapprehension as to the law in this State. In *Tinges v. Moale*, the statement which has doubtless caused the misapprehension was made where there were two brokers, and the sale was made by the owner to a purchaser procured by one of them, and the purchaser paid the commissions to the one broker, and not as in this case where there was no conflict between brokers and where the owner had not paid the commissions to anyone. Immediately following the quotation from the lower Court, which our predecessors held to be a correct exposition of the law, and which we assume caused the misapprehension, JUDGE WEISEL, in speaking for the Court, said: "If there be but one broker employed, he can with safety withhold the name of the purchaser until the sale shall have been made. But as the employment of one broker does not preclude the employment of another to procure a purchaser for the same property, it becomes, therefore, the duty of the broker who procures one, and who looks to the security of his commissions, to report the name and offer to his principal, that the latter may be notified in time and thus put upon his guard before he pays the commissions to either." If an owner has employed two brokers, and one of them produces a purchaser, and the owner does not know, and has no reason to believe, that the other really procured the purchaser, and pays in good faith the commissions to the one so producing him, he ought not be required to pay

the other also—thereby paying double commissions,—but where, as in this case, the owner deals with the purchaser—not as one produced or sent by another broker, and does not pay anyone commissions—if a broker who was employed by the owner was in point of fact the procuring cause, he ought not be deprived of his commission merely because the owner did not know that he had procured him. In this case the purchaser and the broker lived in the county where the farm lies, and if the appellants wanted to protect themselves from paying commissions, they might have first communicated with the appellee. They had not revoked his agency, and while five months had expired since they had heard from the appellee, they had not inquired of him as to what he was doing, had placed no limit on the time of the agency, so far as the record discloses, and we cannot say, as a matter of law, under the circumstances, that a period of five months was an unreasonable time.

In *Livezy v. Miller*, 61 Md. 343, it was said: “It is well settled by the authorities generally, and in this State, that a broker is entitled to his commissions if the sale effected can be referred to his instrumentality. It is also the established law that, after negotiations, begun through a broker’s intervention, have virtually culminated in a sale, the agent cannot be discharged, so as to deprive him of his commissions. If the agent is the *procuring cause* of the sale made, he will be awarded his commissions.” *Tinges v. Moale* is there cited, together with other Maryland cases, and as no reference was made to any contrary doctrine being announced by it, it is clear that it was not supposed by the Court, when *Livezy v. Miller* was decided, that *Tinges v. Moale* was contrary to the doctrine then announced, that “If the agent is the procuring cause of the sale made he will be awarded his commissions.” Whether the agent was the procuring cause of the sale is the question upon which the right to commissions generally depends. *Blake v. Stump, supra*; *Hallyday v.*

Md.]

Opinion of the Court.

Southern Agency, 100 Md. 294; *Walker v. Baldwin*, 106 Md. 634; *Martin v. Baltimore City*, 109 Md. 260.

It is clear then that the appellants could not rely on the doctrine announced in *Quist v. Goodfellow*, on the theory that *Tinges v. Moale* was in accord with it, as the latter case cannot be held to have adopted that doctrine as applicable to such facts as we have before us, and, if it had, would not be in line with the later decisions of this Court. As we have already indicated the appellants did not so contend, but as in our investigation of the subject we found that *Tinges v. Moale* had been so understood by such high authority we thought it proper to correct the erroneous impression.

Without deeming it necessary to enter upon a discussion as to what may be deemed a "procuring cause," as the cases above cited and others in this State have sufficiently considered that question to relieve us of again doing so, we are not prepared to say that there was no evidence, legally sufficient, tending to show that the appellee was the procuring cause of this sale. There are some facts and circumstances which tend to show that he was and others that tend to show the contrary. It is therefore, for the jury to determine, with appropriate instructions by the Court. In view of what we have said, in considering the sixth and eighth prayers of the defendants, we are of the opinion that the plaintiff's prayers ought to have been so qualified as to submit the questions presented by them, and we think there was error in not so qualifying them, either in the prayers themselves, or by appropriate reference to the defendants' prayers, which we have said ought to have been granted, but we cannot hold there is no evidence legally sufficient to show that the plaintiff was the procuring cause of the sale, if the jury adopts the plaintiff's theory of what took place between him and Caey. The defendants' special exceptions were properly overruled and their first and second prayers properly rejected.

Their third prayer was also properly rejected, as the letters of January 27th and 29th did not attempt to name all

the terms of the employment, especially as to the commissions to be allowed. The letter of January 27th began by saying, "Referring to our conversation," etc.

We see no reversible error in the other exceptions. In the first place by reason of the defendants' fifth prayer, which was granted, those rulings could do no harm, but, in addition to that, without giving other reasons, what was admitted under the questions embraced in those exceptions tended to show the plaintiff had not abandoned the employment, but was still acting under it when the sale was made.

For errors in granting the plaintiff's two prayers (without such qualifications as we have spoken of), and in rejecting the sixth and eighth of the defendants, the judgment must be reversed.

Judgment reversed and new trial awarded, the appellee to pay the costs, above and below.

EUGENE L. DIDIER ET AL. vs. ELEANOR L.
MERRYMAN.

Injunction to Restrain Interference With Drain Pipe—Possession and Use of Drain Sufficient Without Proof of Title Against Trespasser—Right of Defendant to File Answer When Demurrer Overruled.

A party in possession of land and of drain pipes used in connection therewith is entitled to an injunction restraining a trespasser from interfering with the drain or making use of it. In such case it is not necessary that the plaintiff's title to the land should be fully stated in the bill, nor that evidence of the title should be filed as an exhibit. Nor is it necessary for the plaintiff to allege that he was the owner of the drain.

Md.]

Syllabus

If his right to it is only an easement, it is entitled to protection.

Plaintiff's bill alleged that she had been in possession of a certain house and lot for a long time and had used in connection with it a drain pipe, running down the middle of an alley in the rear of the lot, for the purpose of carrying off sewage and water; that the drain had been built for the exclusive use of plaintiff's house and certain adjoining properties; that it was insufficient in size for this purpose and had frequently become choked so that the water and refuse from it was backed up on plaintiff's lot, which was lower in grade than the other houses using the drain, with one exception; that the defendant was the owner of a house on the opposite side of said alley and, without any right so to do, had made a connection with said drain pipe and discharged into it water from his house; that this wrongful act exposed plaintiff to an increased danger of overflow from the drain. The bill asked for an injunction. *Held*, that a demurrer to the bill was properly overruled and that the plaintiff is entitled to the relief asked for, since injury from defendant's wrongful act may reasonably be anticipated, and an action at law would not afford an adequate remedy.

When a demurrer to a bill asking for an injunction is overruled, the Court should not at once issue the writ in final and absolute terms, but should afford the defendant an opportunity to file an answer.

Decided January 10th, 1911.

Appeal from Circuit Court No. 2 of Baltimore City (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

R. Contee Rose, for the appellants.

Joseph P. Merryman (with whom was *W. T. Roberts* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

The appeal in this case is from a decree of Circuit Court No. 2 of Baltimore City overruling a demurrer to a bill for mandatory injunction and granting the writ as prayed.

It is alleged in the bill of complaint that the plaintiff is a tenant for life in possession of the lands and improvements known as 203 East Lafayette avenue, in the City of Baltimore, and that such tenancy has existed for more than twenty-five years; that connected with the premises and appurtenant thereto is a drainpipe carrying off the refuse from the well in the yard and the toilet in the house; that this drain was constructed at great cost for the use of the premises in question in the year 1882; that when originally constructed the drain was also for the benefit of the contiguous properties known as 201, 205 and 207 East Lafayette avenue; that subsequently permission was granted the owner of Nos. 209 and 211 on the same avenue to connect the drain with his premises; that at various times the drain has become choked and the waste material from the premises Nos. 205, 207, 209 and 211, instead of passing down the drain to the public sewer, have backed on the premises of the plaintiff to the injury of her property and the detriment of the health of herself and her family, obliging her to vacate her home for a time; that the relative position and grade of the plaintiff's ground is several feet lower than the other lots, except No. 201, and that consequently, when the drain is choked the plaintiff's lot becomes a reservoir for the sewage flowing from the premises Nos. 205, 207, 209 and 211; that this has occurred on three several occasions, and that the plaintiff, upon demand of the City authorities, as well as for the protection of her health and property, has been compelled to abate the nuisance at her own expense and to call upon the adjacent proprietors contributing to the overflow of the

Md.]

Opinion of the Court.

drainage for their due proportion of the expense of the abatement, and that she has received such reimbursement except in the case of one of the overflows, in reference to which suits against two of the adjoining owners are now pending.

The bill then proceeds to charge in effect that in the preceding August the defendants purchased the premises No. 1721 North Calvert street, situated in the rear of the lots above mentioned and bordering on an alley through which the drainpipe referred to is laid (the location of the several properties and of the drain being shown on a plat filed with the bill); that the defendants, without any lawful right and intending to invade and trespass on the property of the plaintiff, have connected the pipes on their premises with the drain and are passing into it the flow from the toilets, sinks and baths in their apartment house accommodating five families; that the drainpipe as originally constructed was intended to drain only the refuse from wells on the various lots first mentioned, the flow from the sinks and baths on the premises having a surface drainage; but that the owner of lots Nos. 209 and 211, upon being given permission to connect his wells with the drain, closed the wells and has since discharged into it all the drainage from his premises; and that the addition of the sewage from the property of the defendants increases the danger from an overflow on the plaintiff's premises and makes her liable to greater burden and expense from stoppage in the drain which may occur at any time.

The demurrer, while admitting these allegations, questions their sufficiency to entitle the plaintiff to an injunction, for which she prayed, prohibiting and restraining the defendants from using the drain and requiring them to remove their connections.

It is contended, first, that the averments are deficient in not stating the origin and character of the plaintiff's title to the property affected by the defendants' alleged trespass; and it is insisted that if her title is a matter of written or

record evidence an exhibit of the instrument under which it was acquired should have accompanied the bill.

The assertion of title was not necessary to the plaintiff's case. It is alleged, and admitted by the demurrer, that she is in possession of the premises exposed to the nuisance which is threatened by the defendants' wrongful acts, and that she is in the actual use of the drain with which they have unwarrantably interfered. If her right to the relief sought could be held to be dependent upon her title, there would be no question as to the necessity for clear and certain allegations as to that essential fact and for the production, if procurable, of an appropriate exhibit. But a bare possessor of property is entitled to be protected against a mere trespasser without reference to the question of title. This principle has been repeatedly applied in actions of trespass at law; *Tyson v. Shuey*, 5 Md. 540; *Wilson v. Hinsley*, 13 Md. 64; *New Windsor v. Stocksdule*, 95 Md. 196; *Carter v. Md. & Pa. R. Co.*, 112 Md. 599; *Stanton v. Lapp*, 113 Md. 324; and it is equally applicable to suits in equity where the conditions are such in other respects as to justify the granting of equitable relief. 28 *Am. & Eng. Encyc. Law*, 2nd Ed., 595, 573; 2 *Waterman on Trespass*, 346, 576.

The rule in reference to the filing of exhibits in proceedings of this nature is that "where the right to an injunction is based upon a written instrument in the possession of the complainant, or to which he has ready access, the instrument itself, or a copy, ought to be filed with the bill, in order that the Court may see whether the complainant is entitled to the relief prayed." *Baltimore v. Keyser*, 72 Md. 115; *Gottschalk v. Stein*, 69 Md. 51; *Nagengast v. Alz.*, 93 Md. 525. But where such a necessity is not present the production of exhibits is not required. *Webb v. Ridgely*, 38 Md. 369.

In the case now under consideration the reason for the rule stated does not exist, because the plaintiff's equity does

Md.]

Opinion of the Court.

not depend upon any documentary or other evidence of title or ownership but is fully supported by the fact of her possession of the premises and appurtenant drain in reference to which the trespass charged against the defendants is alleged to have been committed.

The case of *Stinson v. Ellicott City & Clarksville Turnpike Co.*, 109 Md. 111, specially relied upon by the appellants in this connection, involved a question of title, and the plaintiff relied in her bill upon a grant which was not authenticated by an exhibit. In that situation the rule was plainly enforceable; but in the present case we find no ground upon which it can be invoked.

It is urged that the bill of complaint does not clearly show the nature of the plaintiff's interest in the drain affected by the trespass, as to whether it amounts to ownership or merely to a right of user. This distinction, under the circumstances, is entirely immaterial. The plaintiff has alleged her possession of the premises to which the drain is appurtenant and her actual user of the drain for many years, and that the defendants without lawful right, but wilfully intending to trespass on the property of the plaintiff, have made the connection described in the bill. The possession thus alleged, and admitted by the demurrer, to have been wrongfully invaded by the defendants, must be regarded as including at least an easement in the drain, and as such it is entitled to protection by a Court of Equity. *Jay v. Michael*, 92 Md. 198; *Shipley v. Caples*, 17 Md. 183; *Roman v. Strauss*, 10 Md. 89; 14 *Cyc.*, 1223, 1219-20.

The remaining objection offered to the bill is that its averments are vague and uncertain in respect to the particular injury of which the plaintiff complains as a result of the alleged trespass. It is a familiar rule that the facts upon which reliance is placed for relief by injunction must be clearly stated. *Miller's Eq. Proc.*, 687. We think, however, that in this case the rule has been substantially observed. The bill describes the conditions existing prior to the use

of the drain by the defendants. It shows that even then the capacity of the drain was overtaxed, and that repeated stoppages and overflows occurred producing special damage to the plaintiff by reason of the lower grade of her property as compared with the adjoining premises. The charge is then distinctly made that the defendants' wrongful and extensive appropriation of the use of the drain has increased its liability to become choked and to discharge its contents upon the plaintiff's lot, and that she is thus exposed to the danger of recurring nuisances. We have no doubt as to the sufficiency of these allegations to entitle the plaintiff to relief by injunction. It is not necessary that she should wait for the actual occurrence of the injury which it is thus shown may be reasonably anticipated. *Brauer v. Refrigerating Co.*, 99 Md. 381, and it is obvious that an action at law would not afford an adequate remedy. *Long v. Ragan*, 94 Md. 464; *Shipley v. Ritter*, 7 Md. 408; *Gilbert v. Arnold*, 30 Md. 29; *Davis v. Reed*, 14 Md. 156. The demurrer to the bill of complaint was, therefore, properly overruled.

In its decree, thus disposing of the demurrer, the Court below granted immediately and in absolute terms the writ of injunction as prayed in the bill, without providing an opportunity for the filing of an answer. There is no suggestion in the record, and none was given in the argument, as to the reason for this action, but as it involves a departure from the established practice and the requirements of the Equity Rule of this Court on the subject, it is necessary that the decree be reversed in this particular. It is provided by Rule No. 22, embodied in the Code as section 153 of Article 16, that "if upon the hearing, any plea or demurrer is overruled unless the Court or judge thereof hearing the same be satisfied that it was intended for vexation and delay, the defendant shall be required to answer the bill, or so much thereof as may be covered by the plea or demurrer, at such time as, consistently with justice and the rights of the defendant, the same can be reasonably done; in default whereof, the bill

Md.]

Opinion of the Court.

shall be taken, as against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly; and such decree shall also be made when the Court or judge thereof shall be satisfied that the plea or demurrer was interposed for vexation or delay merely, and is frivolous or unfounded."

The demurrer in this case was accompanied by an affidavit that it was not intended for delay, and the decree does not indicate that the truth of this statement was doubted by the Court. We see nothing in the record or in the character of the demurrer to disentitle the defendants to their right to answer the bill and be heard on the merits in accordance with the rule quoted and the uniform practice. *Stinson v. Ellicott, etc., Co.*, 109 Md. 114; *Trego v. Skinner*, 42 Md. 426; *Miller's Eq. Proc.*, 174.

The cause will be remanded in order that this opportunity may be afforded.

Decree affirmed in part and reversed in part and cause remanded, the appellee to pay the costs of this appeal, the costs below to abide the result of the suit.

ST. JAMES AFRICAN METHODIST EPISCOPAL
CHURCH *vs.* THE BALTIMORE AND OHIO
RAILROAD COMPANY.

*Eminent Domain—Right of Railroad Company to Condemn
Unoccupied Part of Private Cemetery—Restriction in
Charter of Railroad as to Width of Roadbed—
Right to Take Additional Land.*

A railroad company with general powers of eminent domain has the right to condemn for its use the unoccupied part of a private cemetery owned by a religious corporation.

The provisions of Code, Art. 23, sec. 133, relating to the opening of streets and roads through the property of any cemetery company incorporated under said Article, do not apply to a tract of land owned by a religious corporation, part of which is used as a private cemetery.

The charter of the Baltimore and Ohio Railroad Company authorized it to construct a railroad not exceeding 66 feet wide. *Held*, that this restriction is as to the width of the road, and not as to the width of the land that it may be found necessary to take for the purpose of relocating the tracks.

The question whether a railway company has the right under its charter to condemn certain land for an addition to its roadbed is a matter exclusively within the jurisdiction of the Court to which the inquisition is returned, and no appeal lies from its action in the premises.

Decided January 10th, 1911.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

Md.]

Opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, THOMAS, PATTISON and URNER, JJ.

P. Leslie Hopper and James J. Archer, for the appellant.

Stevenson A. Williams and Fred. R. Williams, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Harford County passed on the 18th day of February, 1910, overruling objections to an inquisition, confirming and ratifying the inquisition of the jury in the condemnation proceedings, and directing a judgment in favor of the appellants against the appellee for the sum of three thousand dollars.

There was no objection or exception in the Court below to the award of damages, but the objections rest upon the validity of the power and authority of the appellee to condemn the property sought to be taken. These objections are:

First—Because the property is a public cemetery, and the appellee has no power to condemn it, under section 133, Art. 23 of the Code of Public General Laws, which provides that no lanes, alleys, streets, *roads*, canals or *public thoroughfares* of *any sort* shall be opened through the property of any cemetery company incorporated under the provisions of this Article which is used or appropriated for the purpose of burial
* * *

Secondly—Because the taking of one and twenty-nine one hundredths of an acre, which is about two-thirds of the cemetery, will destroy the entire cemetery.

Thirdly—Because the appellee has no power under its charter to condemn more than 66 feet wide, and the land sought to be condemned in these proceedings is for a right of way which exceeds in width sixty-six feet; and

Fourth—Because it was a public cemetery in actual use by the public for the burial of the dead at the time of the institution of these proceedings.

It is well settled and conceded by the appellant in this case that the action of the Circuit Court in condemnation cases is exclusive and final, and unless the Circuit Court exceeded its jurisdiction an appeal will not lie to this Court, because the proceeding is a special and limited statutory one, from which the law provides no appeal. *Hopkins v. P., W. & B. R. R. Co.*, 94 Md. 265.

As was said in the *Hopkins case*, *supra*, the only ground upon which the present appeal can be maintained is that the appellee had no right at all to make the condemnation complained of, and for that reason the Circuit Court exceeded its jurisdiction in confirming the inquisition. If such be the case, the decisions support the right of appeal. *George's Creek Coal and Iron Co. v. Central Coal Co.*, 40 Md. 425; *B. & O. R. R. Co. v. Waltemyer*, 47 Md. 331; *Herzberg v. Adams*, 39 Md. 312.

In the present case, the facts upon which the objections are based and upon which the questions of *ultra vires* arise, briefly stated, are these: The appellant is a religious corporation formed for the purpose of religious worship, according to the rules, regulations and discipline of the African Methodist Episcopal Church, and incorporated under the general incorporation laws of the State.

On the 4th of February, 1895, the appellant acquired title to what is called "Square No. 28 of Reed's Addition to Havre de Grace," containing on or about two acres of land. This square was used as a church cemetery—that is, one-half of the square was laid off into lots about 20 by 24 feet, with walks about four feet wide between the lots. Twenty-eight of these lots were sold by the trustees of the church, and there are about 150 or 160 persons buried in these lots. According to the testimony, any person can be buried there who

complies with the regulations prescribed by the trustees, and the lots are sold to any person who desires to buy, provided he complies with the rules and regulations of the trustees.

The entire part of the square proposed to be taken by the appellee and condemned by the proceedings was unoccupied, except one lot, which contained two graves, and the appellee and the owner of this lot agreed upon a price to be paid for it. And it appears there were no other graves in any part of the two-thirds of Square No. 28, proposed to be taken by the appellee, but it was an unoccupied part of the cemetery.

The appellee is a public service corporation, and by virtue of its charter, Chapter 123 of the Acts of 1826, and the supplements thereto, operates its Philadelphia Branch Railroad from Camden Station, Baltimore City, through Baltimore, Harford and Cecil Counties, and other places.

It became necessary, as stated by the appellee in its brief, in order to standardize its tracks for safe approach to its new bridge over the Susquehanna river at Havre de Grace, Harford County, on its Philadelphia branch, to relocate its centre line in Harford County, between its station at Havre de Grace and the west end of its bridge, which is ninety feet above the river.

There were four cemeteries between those points, either contiguous to its present right of way or closely adjacent thereto, and according to the evidence and the surveys it was found almost impossible to relocate the line effectively, without running an impossible line, or interfering with one or the other or two of the cemeteries. The appellee, after a thorough examination into the possible locations, adopted what is called the compromise line and decided upon the relocation of the line, to be laid through the unoccupied portion of the church cemetery here in question—that is, taking about two-thirds of Square No. 28 of Reed's Addition to Havre de Grace. The trustees and the appellee having failed to agree upon the purchase price, the unoccupied part of

Md.]

Opinion of the Court.

Square No. 28, containing 1 29/100 acres was condemned and the damages assessed at three thousand dollars.

The question, then, we have to decide is whether or not, upon these facts the appellee possessed the power to condemn the property here in question.

The objection that the appellee has no power to condemn a public cemetery is not presented on this record, because it is clear that the appellant is not within the terms of section 133, Article 23, since it is not "a cemetery company incorporated under the provisions of the Code." Nor is it a cemetery company incorporated under Article 23, sec. 20, class 5 of the Code of Public General Laws, "for forming, laying out and maintaining cemeteries in this State." The proof shows that it was a private cemetery, belonging and attached to the church of the appellant, and not a public cemetery within the terms of Article 23 of the Code.

Now, whether the language of the appellee's charter, Act of 1826, Chap. 123, secs. 14, 15 and 17, wherein the power to condemn is given, is broad enough to include a public cemetery, incorporated under Art. 23 of the Code, and if so, whether this power is repealed or qualified by the terms of Article 23, sec. 133, which provides that no lanes, roads * * * or public thoroughfares of any sort, shall be opened through the property of any cemetery company incorporated, etc., it is not necessary to inquire, because we all agree that, under the facts of this case, the appellee had a valid power to condemn the unoccupied part of the cemetery here in controversy.

By section 15 of Chapter 123, of the Acts of 1826, the appellee had power to condemn any land * * * or any improvements which may be wanted for the construction or repair of any of the roads or any of their works for the purchase or use and occupation of the same. And by section 17 it is further provided, any *lands, materials* or other property in order to the construction or repair of any part

of the road or roads or their works or necessary build-
ings * * *

In the recent case of *Baltimore & Ohio R. R. Co. v. Waters*, 105 Md. 397, this Court said that the Act of 1826, Chap. 123 (the charter of the appellee), was an irrepealable contract, and beyond the power of withdrawal by repeal.

In 15 *Cyc.* 610, note 61, it is said, where a railroad company has no other feasible route it may condemn a right of way through part of a cemetery which consists of a steep, rocky slope, fronting on a river, and which was never used for cemetery purposes and was unfit for such, it appearing that the graves in the rest of the cemetery would never be disturbed by such appropriation.

In *Davis v. Cem. Co.*, 65 Kan. 563, it is said, no reason can be suggested why a private cemetery corporation operated for profit should receive any more grace at the hands of the Legislature than a private corporation organized for any other purpose.

In *Turnpike Road v. Railroad Co.*, 81 Md. 256, this Court said: "It is now settled by authority which this Court is bound to obey, that the grant of a franchise is of no higher order, and confers no more sacred title than a grant of land to an individual, and when public necessities require it, the one, as well as the other, may be taken for public purposes, on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts. *Bridge Co. v. Dix*, 6 Howard, 507; *Railroad Co. v. Railroad Co.*, 13 Howard, 83."

It has also been said on this subject that a grant made for one public purpose must yield to another more urgent and important, and that the power to take private property for public use "reaches back of all constitutional provision." *Pumpelly v. Green Bay Co.*, 13 Wallace, 178.

In addition to the cases cited, we refer to the following, in support of our views, upon the proposition that the unoccu-

Md.]

Opinion of the Court.

pied part of a private cemetery may be condemned for railroad or other public purpose: *In re 22nd Street*, 102 Pa. 108; 133 N. Y. 329; 104 Mich. 595; *Sachs v. Minneapolis*, 75 Minn. 30; *Wood v. Macon*, 68 Ga. 539; *N. Y. C. & H. R. v. M. G. L. Co.*, 63 N. Y. 334; *Sp. C. G. Co. v. P. S. R. R.*, 167 Pa. 6; *Cem. Co. v. Cem. Asso.*, 93 Texas, 569; *Com. Assoc. v. Beecher*, 53 Conn. 557; *Board v. Van Hoesen*, 87 Mich. 540; *Balch v. Co. Commrs.*, 103 Mass. 115.

In the Matter of Board of Street Opening, 133 N. Y. 333, it is said: "But this was not a public cemetery, St. John's Cemetery, Trinity Church, N. Y., and so far as appears had never been devoted to a public use. The public generally never had any right of burial therein. No burials therein could be made except by permits given by Trinity Church, and all interments therein had been made by its authority. The cemetery land was therefore devoted to a private and not a public use."

In *Matter of Deansville C. Association*, 66 N. Y. 573, the Court said: "The point upon which the present case turns is the nature of the use for which the land in question is sought to be taken. It is to be vested in trustees with power to divide into lots and sell those lots to individual owners. It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured. The prices at which the lots are to be sold are to be fixed by private agreement; the corporation is to be managed by trustees elected by the lot owners. The lots or the rights of the owners therein are to descend as private property to the heirs of their owners, and by the Act of 1874 (compare Code, Art. 23, sec. 134) the owners may, by leave of the Courts, sell their lots and put the proceeds in their pockets. The substantial right of enjoyment of the property is vested in the individual lot owners; and the whole effect of the incorporation of their cemetery associations is to enable a number of private indi-

viduals to unite in purchasing property for their own use and that of their descendants as a place of burial and to secure a permanent management of it through the instrumentality of trustees appointed by themselves and subject to no other control, with the privilege when they cease to use their lots as a place of burial to sell them and receive the proceeds for their own benefit. It is argued that the property is to be used as a place of burial, and that the burial of the dead is a public benefit, and therefore the use is public. But the answer to this argument is that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot owners. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the Legislature might authorize A. to take the land of B. for a private burial place of A. and his family. The fact that this land is taken for the benefit of a number of individuals for division among themselves or their grantees for their own use as a cemetery makes the case no stronger than if taken for the benefit of a single individual."

The cases cited by the appellant in support of its views are clearly distinguishable from the case at bar. Some of the decisions rest upon the phraseology of the statutes of the States and in others the defendant was incorporated as a cemetery company.

As to the last ground relied upon by the appellant that more than sixty-six feet in width has been condemned, whilst the company, under its Charter, has no power to condemn more than sixty-six feet, we need only say that this question has been so recently and carefully considered by this Court, in the case of *Dolfeld v. Western Md. R. Co.*, 107 Md. 584, that we deem it unnecessary to discuss it further. It was held in that case, that the company had the right under its charter and the general laws to condemn the additional land. The restriction is on the width of the road and not on the

width of the land occupied. The right to build a road sixty-six feet wide includes the right to acquire sufficient land to enable the company to do the thing it was authorized to do, so the taking of more than sixty-six feet, under the circumstances of this case, was not an *ultra vires* act. It was also said in *Dolfeld's case*, that the question whether a railway company has the right under its charter to condemn additional land is a matter exclusively within the jurisdiction of the Court, to which the inquisition is returned and which is authorized to confirm or reject the same. *Webster v. Pole Line Co.*, 112 Md. 416; *C. & P. R. R. Co. v. B. & O. R. R. Co.*, 57 Md. 267.

We are, therefore, of the opinion, for the reasons given that the appellee company had the power to make the condemnation in this case, and that the Court below had exclusive jurisdiction over the proceeding and no appeal lies to this Court from its decision. *Moore v. Bel Air*, 79 Md. 397; *N. Y. Mining Co. v. Midland Co.*, 99 Md. 506; *Webster v. Pole Line Co.*, 112 Md. 417.

The appeal will be dismissed and the writ of error quashed.

*Appeal dismissed and writ of error quashed,
with costs.*

Md.]

Syllabus.

MARY J. BADDERS vs. WILLIAM J. O'BRIEN, JR.

Authority of Orphans' Court to Authorize Executor to Compromise Suit Against Estate—Account Making Allowance for Settlement of Claim and Counsel Fees Upheld.

The mere passing of a claim against the estate of a deceased person in the Orphans' Court, or its allowance there in the *ex parte* account of an executor, does not prevent parties in interest from contesting it.

The Act of 1908, Chap. 428, provides that the Orphans' Court shall have power to authorize any executor or guardian to compromise any claim against or in favor of the estate of any decedent or ward in such manner as the said Court may approve. *Held*, that this Act does not confer upon the Court full power to determine the validity and amount of a creditor's claim against the estate of the decedent or ward, but its decision in regard to such claim will be upheld in the absence of positive error.

In this case, an executor was authorized to compromise a suit against the estate, in which \$15,000 was claimed for services rendered to the testator, by the payment of the sum of \$1,000, and he was also allowed a counsel fee of \$500. An *ex parte* account was passed in the Orphans' Court making these allowances, to which account a legatee excepted. After testimony was taken, the Orphans' Court dismissed the exceptions, and the legatee appealed. *Held*, upon consideration of the evidence, that the action of the Orphans' Court in authorizing the compromise of the suit and in allowing the counsel fee should be affirmed.

Decided January 11th, 1911.

Appeal from the Orphans' Court of Baltimore City.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Horton S. Smith (with whom was *Wm. R. Barnes* on the brief), for the appellant.

Osborne I. Yellott and *J. LeRoy Hopkins*, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appeal before us was taken from orders of the Orphans' Court of Baltimore City dismissing the exceptions of the appellant to the allowance of two items in an administration account which had been passed in that Court.

It appears from the record that the account was passed in the usual *ex parte* form on April 29th, 1909, by William J. O'Brien as executor of the last will of Joseph Zane. The appellant was named as a legatee in the will and, in her right as such, she filed a petition in the Orphans' Court, a few days after the passing of the account, excepting to the allowances therein made of \$1,000 as the sum for which a suit at law against the estate had been compromised by the executor and the further sum of \$500 as a fee to his counsel for their services in that suit.

On the 9th of April, 1909, before the presentation of the account in the Orphans' Court the executor filed a petition therein alleging that Gertrude Flaherty had sued him in the Baltimore City Court for \$15,000 for services rendered to the testator as housekeeper, nurse and companion from July 15th, 1903, to March 21st, 1909. He further alleged that he had, under an order of the Orphans' Court, employed counsel to defend the suit who had advised him to accept a proposition made by the plaintiff's counsel to compromise the

Md.]

Opinion of the Court.

suit for \$1,000 as a liquidated amount to be allowed to her in the administration account to be passed by him and that he himself was satisfied after careful investigation that it would be to the interest of the estate to make the compromise. The petition was signed by Mr. O'Brien and Isaac S. George as attorneys for the executor and it was verified by Mr. O'Brien's affidavit as executor.

Upon that petition the Orphans' Court passed an order authorizing and directing the executor to compromise and settle the suit and claim of Gertrude Flaherty as prayed in the petition and according to the terms therein set forth. The claim for \$1,000, the amount of the compromise, was accordingly presented to the Register of Wills and by him passed in the usual form and allowed by the Orphans' Court as a credit to the executor in his administration account.

The counsel fee of \$500 to Messrs. O'Brien and George appears in the account as allowed "as per order of Court dated April 27th, 1910," but there is no copy of the order in the record so that we are unable to say whether the fee was allowed by order absolutely or subject to exception.

After the filing of the exceptions by the appellant the Orphans' Court heard testimony upon the issues thereby presented, the petitioner assuming the burden of establishing the truth of the allegations of her excepting petition. Her brief states that she was directed by the Court to assume that burden, but the record is silent upon that subject. Testimony was taken in support of and against the exceptions. The evidence establishes the fact that Miss Flaherty lived with the testator, who was a victim of chronic locomotor ataxia and almost helpless, for more than six years up to the time of his death and that during that time she rendered services in taking care of his house and of him personally. The evidence on her behalf tends to show that she did the domestic work in the house and waited on and nursed him during her entire stay with him. On the other hand the evidence for the exceptant, while it shows that Miss Flaherty

rendered some service in the testator's house and to him personally, tends to prove that she maintained immoral relations to him and that both of them were at times intemperate and led coarse lives.

We refrain from a consideration in detail of the evidence because taken as a whole it satisfies us that her suit against his estate was not devoid of a substantial foundation, and that therefore the compromise of the claim for so small a portion of its face value made by the executor under the authority and direction of the Orphans' Court in the manner already mentioned by us should be upheld.

This Court has repeatedly held that the mere passing of a claim against the estate of a deceased person in the Orphans' Court, or its allowance by that tribunal, in the *ex parte* account of an executor, did not prevent proper parties in interest from contesting it, or even establish a *prima facie* case in its favor so as to cast upon the contestant the *onus probandi* of the impropriety of its allowance. *Stump v. Stump*, 91 Md. 705; *Edelen v. Edelen*, 11 Md. 415; *Levering v. Levering*, 64 Md. 414; *Lee v. Lee*, 6 G. & J. 313.

We also held in *Bowie v. Ghiselin*, 30 Md. 553, which was decided long prior to the passage of the Act of 1908, Ch. 428, that "the jurisdiction to ascertain the validity and amount due to creditors by deceased persons belongs exclusively to Courts of law and equity," and that in the absence of any provision of law conferring upon the Orphans' Court jurisdiction and power to decide upon or determine the validity of the claim of a creditor or to determine its amount "that Court had no power to compel an administrator against his protest to pay the claim." That case has been frequently cited with approval and followed in more recent decisions, but the situation there dealt with has been somewhat modified by the passage of the Act of 1908, Ch. 428, which confers additional powers upon Orphans' Courts. It provides as follows:

Md.]

Opinion of the Court.

"The Orphans' Court shall have power to authorize and direct any executor, administrator or guardian to compromise any claim against or in favor of the estate of any decedent or ward as the case may be, in such manner as the said Court may approve."

This Act does not confer upon the Orphans' Courts the full powers with which Courts of law and equity are invested of deciding upon the validity and determining the amount of a creditor's claim against the estate of a decedent or ward, but merely the power to authorize and direct an executor or guardian to compromise the claim on such terms as meet the Court's approval, without undertaking to determine its legal status or exact amount. The law looks with favor upon the amicable settlement of controversies and the prevention of litigation, and a statute conferring power to effect compromises of claims threatening to involve estates in litigation upon a subordinate tribunal that is not fully equipped to determine their precise legal merits is in harmony with the policy of the law, and the exercise of that power when fairly made should be upheld in the absence of evidence of positive error or injustice. We find no such error or injustice in the case before us as to induce us to reverse the action of the Orphans' Court in directing the compromise of Gertrude Flaherty's claim.

The order authorizing the compromise of the claim, and the one allowing the counsel fee to the executor's attorneys, were both passed on the 3rd of June, 1910. The appeal was taken from "the decisions of the Court dismissing the exceptions of Mary Jane Badders (the appellant) to the executor's account." The exceptions on their face are made to the allowance in the account of the two items of \$500 counsel fee and \$1,000 in compromise of the Flaherty claim. We have therefore treated the appeal as embracing both matters, but as the question of the propriety of the allowance of the fee is not noticed on the appellant's brief and was not insisted upon in

the argument of the appeal we deem it sufficient to say in that connection that no adequate reason has been advanced for disturbing the decision of the Orphans' Court in that respect.

For the reasons stated in this opinion the orders appealed from must be affirmed.

Orders affirmed with costs.

GEORGE E. DISHAROON ET AL. vs. JOSHUA B. WATERS.

Seller of Property Who Has No Title Cannot Recover Purchase Price—Equitable Plea in Action on Single Bill—Parol Evidence as to Location of Oyster Lots.

A party who has no title to property sold by him cannot recover on the single bill given for the purchase money.

In an action upon a writing obligatory under seal for the payment of a sum of money, a plea on equitable grounds states a good defense when it alleges that the single bill was given in consideration of the transfer to the defendant of certain oyster lots, which the plaintiff represented as being situated in the State of Maryland, and that he had a right to transfer under the laws of Maryland, but that in fact the lots were situated in the State of Virginia, and the plaintiff had no right to transfer the same. In such case, a Court of equity would enjoin the prosecution of a suit or the enforcement of a judgment on the writing obligatory, and consequently the plea is good by way of equitable defense.

When the question is whether certain oyster lots sold by the plaintiff to the defendant were within the State of Maryland or in the State of Virginia, a witness may be asked where the lots are located, where the line runs between the

Md.]

Opinion of the Court.

two States in the waters where the oyster grounds in question were situated, and what was recognized by the community generally as the dividing line between the two States. Hearsay testimony and evidence of general reputation are admissible to show what the boundaries of land are.

Decided January 11th, 1911.

Appeal from the Circuit Court for Worcester County (JONES and TOADVIN, JJ.).

The cause was argued before BOYD, C. J., SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

John H. Handy (with whom was *Wm. G. Kerbin* on the brief), for the appellants.

John W. Staton, for the appellee.

THOMAS, J., delivered the opinion of the Court.

This appeal is from the judgment of the Court below in favor of the plaintiff in a suit brought on the promise of the defendants under seal to pay the plaintiff two hundred and twenty dollars, with interest.

The declaration alleges that the defendants "by their writing obligatory, now overdue, bearing date the 14th day of November, 1903, promised to pay to the plaintiff twelve months after date the sum of two hundred and twenty dollars, with interest at five per cent.." etc.

The defendants pleaded that they "were never indebted as alleged"; that the alleged writing obligatory was procured by the fraud of the plaintiff and, for defense on equitable grounds, alleged as follows: "That the parties to this suit are all residents of the State of Maryland, and were residents of said State at and prior to the time of the execution and delivery of said alleged bill or writing obligatory. and that prior

to the execution and delivery by them to the plaintiff of said alleged bill or writing obligatory, and as an inducement thereto, and in consideration therefor the plaintiff, representing to the defendants that he was a legal holder of a certain lot or lots of oyster bottoms located in the waters of Worcester County and State of Maryland, pretended or undertook to sell and transfer the same to the defendants, and that solely by reason of the representation aforesaid the defendants were induced to sign and deliver to the plaintiff said bill or writing obligatory in settlement for said lot; and that afterwards, to wit, during or about the year nineteen hundred and seven, or subsequent thereto, the defendants discovered that the said lot or lots of oyster bottoms were located in the State of Virginia, and that the said plaintiff could not therefore legally hold or sell and transfer the same to the defendants at the time of said representation or afterwards; and that as a matter of fact, by actual survey conducted under the Shell Fish Commission of the State of Maryland, during or about said year 1907, it was shown and determined that said lot or lots of oyster bottoms were actually within the State of Virginia, and these defendants aver and charge that the same are located wholly within the territory of the State of Virginia, and that the plaintiff obtained from the defendants the said bill or writing obligatory by reason of said false representations of facts on his part as to the location of said lot or lots, and therefore should not recover upon the same against these defendants." The plaintiff demurred to the third plea, the demurrer was overruled, and issues were then joined on the first plea and on replications denying the allegations of the second and third pleas.

At the trial the plaintiff offered in evidence the writing obligatory referred to in the declaration and proved the signatures of the defendants thereto. The defendants then called Turner F. Disharoon, one of the defendants, "who testified that prior to the execution and delivery of the aforesaid bill

Md.]

Opinion of the Court.

obligatory to the plaintiff, the latter wanted to sell and we wanted to buy certain oyster grounds near Chincoteague Island, and he represented to the witness the said oyster grounds were within the waters of Maryland, and induced the defendants to purchase the said oyster grounds, on the faith of plaintiff's representations that they were located in the State of Maryland, and that upon this representation and inducement so made the defendants signed and delivered the aforesaid bill obligatory to the plaintiff in settlement of the purchase money therefor; and that all the parties to this case were, at the time of the purchase of said oyster grounds as aforesaid, and ever since have been, residents of the State of Maryland." The witness was then asked the following question: "As a matter of fact where are said oyster grounds located? State to the Court, if you can?" The plaintiff objected to the question, and the Court refused to allow the witness to answer. The witness was then asked the following question: "State, if you know, the line between the State of Maryland and the State of Virginia, in the waters where the oyster grounds which you purchased of Mr. Waters are located?" and upon objection by the plaintiff the Court refused to allow the question to be answered. The witness was then asked the further question: "State, if you know, what is recognized by the community generally in the neighborhood where these oyster lots are located as the line dividing the waters over there, the State of Maryland from the State of Virginia?" and the objection of the plaintiff to this question was also sustained by the Court. The witness was further asked the following question: "State, if you know, the division line between the State of Maryland and the State of Virginia in the waters where said oyster grounds are located, and if yea, state whether or not said oyster grounds are on the Virginia side or on the Maryland side of said line?" but the Court refused to permit the question to be answered.

No further evidence was offered, and the finding and judgment of the Court was in favor of the plaintiff.

The only exceptions in the record are to the rulings of the Court below to which we have referred, and we think there was error in its refusal to allow the questions to be answered.

In the second plea the defendants relied upon fraud, and the third plea, as we understand it, set up the equitable defense of a total failure of consideration for the writing obligatory. It is said in 3 *Pomeroy's Equity*, sec. 1293 (2 ed.): "Equity will never enforce an executory agreement unless there was an *actual* valuable consideration; and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms, and looking at the reality, it requires an actual valuable consideration as essential in every such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements and executory contracts of every description." In *Dorsey v. Hobbs*, 10 Md. 412, Hobbs agreed to sell to Bussard a house and lot in Montgomery County, and Bussard agreed to pay therefor the sum of eleven hundred and fifty dollars. At the time of the contract Hobbs was not seized of the property and never acquired title thereto. The single bill given by Bussard for the sum he agreed to pay for the property came due and Hobbs obtained judgment thereon. Pending the suit on the single bill, a bill was filed for an injunction to restrain the proceedings at law, the injunction was granted, but was subsequently dissolved, and from the latter order the complainant appealed. In disposing of the case CHIEF JUDGE LEGRAND said: "In regard to such a case as this, it appears to us there ought to be no doubt on the mind of anyone as to what should be the decision on obvious principles of equity and common sense. It presents simply this question, whether a person may sell a thing to which he has no title, and recover the purchase money without transferring the title to the thing sold? It would seem

Md.]

Opinion of the Court.

that the bare stating of the question is to resolve it in the negative. * * * The contract is an *unexecuted* one. In speaking of such an one, the Court in *Buchanan v. Lorman*, 3 Gill, 77, hold the following language which is conclusive of this case: 'A vendee of an estate in an unexecuted contract is entitled to have that for which he contracts, before he can be compelled to part with the consideration he agreed to pay.' In conclusion the Court said: "We think the Circuit Court erred in not continuing the injunction to the whole claim." If the plaintiff had no title to the oyster lots in question, and did not convey them to the defendants, a Court of Equity would enjoin the collection of the writing obligatory sued on, and the third plea sets up a good equitable defense.

In order to establish this defense, it was necessary to show that the lots were located in the State of Virginia, and we see no objection to any of the questions objected to. It is a uniform practice in this State in the trial of criminal cases, in order to show the jurisdiction of the Court, to ask a witness where the crime was committed. The answer to such a question necessarily involves a knowledge on the part of the witness of the limits of the county or city within which the case is being tried. This character of evidence is not conclusive, of course, and it may be shown that the witness does not know the boundaries of the particular county or city. In 1 *Greenleaf on Ev.*, sec. 136 (13th ed.), the learned author says: "In matters of public right, all persons are presumed to possess that degree of knowledge which serves to give some weight to their declarations concerning them, because all have a common interest." The witness was properly allowed to state that he and the plaintiff resided in the State of Maryland, which necessarily involved some knowledge of the boundaries of the State. Upon the same principle he should have been permitted to answer the first, second and fourth questions. As a further illustration of the numerous exceptions to the rule against hearsay evidence, a witness may testify to his own age. 1 *Ency. of Ev.*, 735.

It is said in 1 *Greenleaf on Ev.*, sec 430k: "In strictness, a person's belief as to his own age rests upon hearsay only, not on actual observation and recollection. Nevertheless, such belief, sufficient as it is for action in the practical affairs of life, ought also be admissible to judicial inquiries, and such is the conclusion generally accepted."

It is now the settled rule that boundaries may be established by hearsay testimony and by general reputation, and for that reason the evidence referred to in the third bill of exceptions was admissible. In the case of *Peters v. Tilghman*, 111 Md. 227, the Court said: "Defendants' fifth prayer permitted the jury to consider the evidence of the 'general understanding and reputation among the owners, neighbors and others who have been tenants or employes on the said respective lands as to which is the line between the plaintiff's and defendants' lands,' and we think there was no error in the legal proposition asserted." In *Tyson v. Shuey*, 5 Md. 540, "it was objected that the line, boundaries, and location of Greyhound Forest could not be established by general reputation, but the Court overruled the objection." In the case of *Clement v. Packer*, 125 U. S. 309, MR. JUSTICE LAMAR quotes the statement of MR. JUSTICE McLEAN, in *Boardman v. Lessees of Reed*, 6 Pet. 328: "That boundaries may be proved by hearsay testimony is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force." See also 1 *Greenleaf on Ev.*, sec 128 (16 ed.); 2 *Ency. of Ev.*, 722-723.

For the reasons we have stated the judgment of the Court below must be reversed and the case remanded.

Judgment reversed, with costs to the appellants, and a new trial awarded

Md.]

Syllabus.

EVA M. MULFINGER vs. MAGGIE MULFINGER

ET. AL.

Gift of Savings Bank Deposit Placed in Name of Donor in Trust for Herself and Donee, Balance to the Survivor, on Death of Either—Donee Entitled on Death of Donor.

A woman who had certain sums of money on deposit in two savings banks caused the deposits to be transferred to her name in trust for herself and her granddaughter, joint owners, subject to the right of either, the balance at the death of either to belong to the survivor. A few months afterwards the granddaughter drew out most of the money and deposited it in another bank in her own name only. The grandmother filed the bill in this case alleging that she intended to retain the use of the money during her lifetime, and only designed that the granddaughter should get it at her death, to be distributed in accordance with private instructions. The granddaughter answered that the change in the deposit had been made with the consent and upon the advice of her grandmother. The latter died pending the suit. The evidence in the case is held to show that the grandmother intended that the money in question should belong to her granddaughter at her death; that no fraud or undue influence had been exercised upon her; that the withdrawal from the bank was made with her knowledge, and that now the granddaughter is entitled to the fund.

Decided January 11th, 1911.

Appeal from the Circuit Court No. 2 of Baltimore City (DOBLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

D. Eldridge Monroe (with whom was *H. W. Rusk* on the brief), for the appellant.

Edward I. Clark and *Jos. A. Clark*, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from a decree of Circuit Court No. 2 of Baltimore City, which determined the effect of deposits made in several savings banks in trust for two designated persons as joint tenants subject to the order of either of them.

It appears from the record that on and prior to June 1st, 1909, Eva M. Mulfinger, the original plaintiff in the case, who was a widow over seventy years of age, had the sum of \$2,412 on deposit to her credit in the Savings Bank of Baltimore, which she increased by later deposits to \$4,061.20, and she also had the sum of \$1,580 on deposit to her credit in the Hopkins Place Savings Bank in Baltimore. On that day she caused both deposits to be transferred, in her pass book and on the books of the banks, to her credit "*in trust for herself and Maggie M. Mulfinger*" (her granddaughter) "*joint owners subject to the order of either the balance at the death of either to belong to the survivor.*" The transfer of the deposit in each instance was made in pursuance of a written direction, signed by Eva M. Mulfinger, stating specifically the form and terms of the trust on which the deposit was thereafter to be held.

On December the 9th Maggie M. Mulfinger, the granddaughter, drew from the Hopkins Place Savings Bank \$1,589.42 being the entire balance to the credit of the trust account in that institution, and on January 4th, 1910, she drew from the Savings Bank of Baltimore \$2,000, which constituted about one-half of the money there standing to

Md.]

Opinion of the Court.

the credit of the trust account. Of the money so drawn by her from the two savings banks she deposited to her own credit \$3,000 in the Eutaw Savings Bank and \$500 in the Savings Department of the German American Bank.

The grandmother on January 21st, 1910, filed the bill in the present case against her granddaughter and the two banks, in which she had deposited the \$3,500 drawn from the trust accounts, praying for a decree declaring the money to be the property of the plaintiff and requiring it to be paid to her or transferred to her credit.

The bill itself sets up the transfer by the plaintiff of the money in the savings banks to her as trustee for herself and her granddaughter and the survivor of them, in the manner heretofore stated by us, but it avers that the money was in fact the plaintiff's own property, and that she, being old and liable to pass away, had made the transfer in order to so arrange her worldly affairs that she would have the use of the money during her lifetime, and on her death her granddaughter Maggie would get it, without the expense or intervention of the Orphans' Court, and distribute it in accordance with private instructions which she had given to her. It is then charged in the bill that the granddaughter had proved faithless to the trust reposed in her and had drawn out of bank the \$3,500, without the knowledge or consent of the plaintiff, and attempted to convert it to her own use by depositing it to her individual credit in the defendant banks. It is not asserted in the bill that the granddaughter had promised or agreed to distribute the money to other persons when it came to her possession. It is only alleged that such had been the purpose of the grandmother in transferring to herself in trust the money in the savings banks.

All of the defendants answered the bill. The two defendant banks admitted the deposit of the \$3,500 with them by the granddaughter in her own name as in the bill alleged, but denied any knowledge of the source from which she obtained

it, and submitted the determination of their rights to the Court.

The answer of the granddaughter Maggie, admitting the facts of the transfer of the money in the savings banks by the plaintiff to herself as trustee, and the withdrawal of the \$3,500 therefrom and its redeposit in the defendant banks as alleged in the bill, averred and insisted that the plaintiff had made such transfer to herself as trustee voluntarily and in execution of a purpose long entertained and often expressed of benefiting the defendant, and that the withdrawal of the \$3,500 and its redeposit in the name of the defendant had been made by her with the knowledge and consent and under the advice of the plaintiff. The answer categorically denied that there had been any fraud or breach of trust by the defendant in the premises.

After testimony had been taken on behalf of the respective parties, to which reference will be made hereafter, the case was heard in due course and a decree passed declaring the \$3,500 on deposit in the defendant banks to be the property of the granddaughter, Maggie M. Mulfinger, and directing the administrators of the plaintiff, who had died *pendente lite*, to deliver the deposit books for the money to her. From that decree this appeal was taken.

It is not alleged in the bill that the plaintiff was deficient in mental capacity when she made the deposits of June 1st, 1909, in the savings banks in trust for herself and her granddaughter, or that any fraud or undue persuasion was practiced on her to induce her to make them. We have repeatedly held that when a person of sound mind has made a disposition of his property not inconsistent with law it will not be set aside by a Court of Equity because he subsequently changes his mind and regrets the transaction or because the Court regards the disposition as having been an improvident one. *Simpson v. League*, 110 Md. 293; *Kennedy v. McCann*, 101 Md. 651; *Bauer v. Bauer*, 82 Md. 214; *Reed v. Reed*, 82 Md. 138; *Gunther v. Gunther*, 69 Md. 560.

Md.]

Opinion of the Court.

In *Milholland v. Whalen*, 89 Md. 212, after a thorough review of the law upon the subject which it is unnecessary to repeat here, we held a deposit in a savings bank upon precisely the same terms as those upon which the plaintiff in the present case deposited the money in the two savings banks on June 1st, 1909, to have "constituted a valid declaration of trust, in the absence of contravening proof, and that when a trust is thus created the rights of the beneficiary become fixed even though the settlor retains the bank book in his possession." Nor does the present record present such "contravening proof" as to take this case out of the operation of the principle which was held to control *Milholland's case*. We fail to find any such proof in the record.

The plaintiff produced a number of witnesses, who testified to declarations made to them by the grandmother as to her purpose in having the money in the savings banks put in her name in trust for the purposes already mentioned. Those witnesses agree that she told them that she intended that the money should remain in bank, for her use if necessary, until her death and then to be the property of her granddaughter Maggie, but that the latter had drawn the money out of bank without her consent. Mr. Rusk, who was the most intelligent of the plaintiff's witnesses upon this subject, further said that she told him that her intention also was to secure the money at her death to her granddaughter without the expense of going to the Orphans' Court. The statements of the plaintiff to these witnesses were all made after the granddaughter had drawn the \$3,500 out of the savings banks.

On the contrary, John T. Mulfinger, a son of the plaintiff, testified that she had told him, when she sold her Pine street house in the latter part of the year 1909, that she was going to move with her granddaughter, and that she had signed the bank books over to her and that if she wanted any money she would have it. He further said that when he met the plain-

tiff shortly afterwards she told him that she had gone to the bank with the girl and drawn some money and put it in the girl's name, but did not say how much had been so drawn.

Joseph Mulfinger, a grandson of the plaintiff and a brother of Maggie, testified that his grandmother came to him and said: "Joe, I have took and sent Maggie to the bank and I give her all that money, so that your father won't get a cent," and further said to him: "It is my money and I can do with it as it pleases me; she is my granddaughter, and my sister has a granddaughter of her own and she did with her money what she wanted to do with it," and that she always said to him, "everything belongs to your sister and the boys ain't getting a thing" * * * "boys can go out and make a living, but a girl has to be attending to the house all the time."

John V. Foeller testified that in December, 1909, when he was at the plaintiff's house she told him in the presence of her granddaughter Maggie that she wanted him to go to bank with Maggie to draw some money; that both her name and Maggie's were on the books, but that the lawyers told her that if she were to die her son could come in and draw the money and Maggie could not stop him, even though her name was on the book, and that the only way to stop him was to have the money withdrawn and deposited in Maggie's name. He further said that she sent him with Maggie with the two bank books to draw the money, and that they drew \$1,587 from the Hopkins Place Savings Bank and deposited \$1,000 of it in the Eutaw Savings Bank and \$500 in a bank on Broadway and Eastern avenue, the name of which he did not remember. He further said that after having made the deposits Maggie took the Eutaw Savings Bank book and a deposit slip that had been given her for the \$500 deposited in the other bank and gave them to her grandmother. The same witness further testified that when Maggie drew the \$2,000 out of the Savings Bank of Baltimore he went with her and that she redeposited in her name in the Eutaw Sav-

Md.]

Opinion of the Court.

ings Bank, and then in his presence handed to the plaintiff the Eutaw Savings Bank book with the entry of the deposit in it, and also the book of the Savings Bank of Baltimore from which the \$2,000 had been withdrawn, and that the plaintiff, after looking at the books, said to Maggie, "Here. you take these books; they ain't no good to me; they are all yours." He also said that the plaintiff had told Maggie to draw all of the money from both savings banks, but that she drew only \$2,000 from the Savings Bank of Baltimore because she did not like to draw it all.

Joseph A. Clark, one of the defendants attorneys of record, testified that in September, 1909, he drew a will for Eva M. Mulfinger the plaintiff giving all of her estate, except \$100. to her granddaughter Maggie and that on being told by Maggie of the money on deposit in the savings bank for their joint benefit he told her that if the money was in their joint names and her grandmother died her father could stop the payment of the money at the bank, that there were decisions of the Courts to that effect, and that he advised her to go and draw the money out and put it in her own name.

The defendant, Maggie, gave her own evidence, in so far as she was held to be competent in view of the death of the plaintiff, tending to corroborate the allegations of her answer.

We think that this testimony, in spite of the inconsistencies appearing in part of it, when taken as a whole, not only falls far short of contravening the natural import of the terms of the deposit of June 1st, 1909, in the savings bank to the credit of the plaintiff in trust for herself and her granddaughter as joint tenants subject to the order of either, but confirms the normal presumption that the terms of the trust upon which the plaintiff had the deposits in the savings banks entered to her credit as trustee on June 1st, 1909, expressed her true and deliberate intention and that they should be given their full effect.

It follows from what we have said that the learned Judge below committed no error in awarding to Maggie M. Mul-

Syllabus.

[114]

finger the \$3,500, held by the defendant banks, and directing the delivery to her of the pass books evidencing its deposit with them.

The decree appealed from must be affirmed.

Decree affirmed with costs.

LAURA P. FITZGERALD ET AL. *vs.* JOSHUA S.
RAWLINGS ET AL.

*Validity of Assignment of Life Insurance Policy to Creditor—
Assignee Entitled to Entire Proceeds of the Policy.*

At a time when A. was indebted to B., and when it was contemplated that further advances would be made, a policy of insurance on the life of A. was issued. In pursuance of an agreement previously made, A. assigned this policy to B. in absolute terms, and the assignment stated that "this transfer is not made for the purpose of securing any indebtedness or as collateral security, but with the intent and for the purpose of divesting the assignor of all title to and interest in said policy." The premiums on the policy were paid by B., and their payment was a part of the consideration of the assignment. At the time of A.'s death he was indebted to B. in the sum of \$1,029. The amount of the policy was \$2,500, and it was claimed both by B. and the administrators of A. *Held*, that B. had an insurable interest in the life of A.; that the policy was issued for his benefit as a creditor; that the assignment was a *bona fide* business transaction, and not a device to cover a wagering contract on the life of A.; that the assignment is not invalidated by the statement in it that it was not for the purpose of securing an indebtedness, and that B. is now entitled to the entire proceeds of the policy.

Decided January 11th, 1911.

Md.]

Opinion of the Court.

Appeal from the Circuit Court of Baltimore City (NILES, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Luther E. Mackall (with whom was *Alonzo L. Miles* on the brief), for the appellant.

Richard M. Duvall (with whom was *R. W. Baldwin* on the brief), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

This is an interpleader proceeding brought on the 18th day of March, 1910, in the Circuit Court of Baltimore City to determine the true ownership of the proceeds of a policy of insurance on the life of George B. Fitzgerald, now deceased, of Somerset County, Maryland. The policy is dated on the 21st of October, 1908, and was issued by the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, for the sum of \$2,500, and under one of the conditions of the policy, the amount of the insurance was payable "unto such beneficiary or beneficiaries of the insured as may hereafter be designated, under the contract."

The insurance company disclaims any interest in or claim to the fund and admits its liability under the policy. The proceeds of the policy has been paid into Court by the insurance company, to be distributed to the proper parties entitled to receive it.

The fund in controversy is claimed, first, by the appellees, co-partners trading as the Rawlings Implement Company of Baltimore, under and by virtue of an assignment and transfer of the policy to them, from Fitzgerald, the insured, in his lifetime, dated the 26th day of October, 1908, and secondly, it is claimed by the appellants, administrators of

Fitzgerald, as representatives of his personal estate, upon the ground that the particular kind of assignment in this case was void and invalid, because given to cover a wagering and a gambling contract.

The validity *vel non*, then, of the assignment of the policy of insurance is the controlling and substantial question in the case, because we are dealing with a fund that is confessedly derived from a legal and valid source, that is from a valid life insurance policy, the legality of which the insurance company admits, and has paid the proceeds of the policy into Court, to be distributed to the parties entitled.

Obviously, if the assignment in question is legal and valid, the appellees, the Rawlings Implement Company must be entitled to the fund, under the conceded facts of the case, because to strike down the policy itself would defeat the object of this proceeding, and destroy the claim of both the appellants and appellees.

The assignment of the policy which is somewhat unusual in form, will be set out in full, and considered by us. It is as follows:

"In consideration of one dollar in hand, the payment of premiums already made or to be made, and other valuable considerations, the receipt whereof is hereby acknowledged, I hereby sell, assign and transfer, absolutely, unto C. T. Marsden, Treas. Rawlings Implement Co., of Baltimore, Md., his administrators or assigns, all my right, title and interest in and to a certain policy issued by the Northwestern Mutual Life Insurance Company of Milwaukee, Wis., on the life of George B. Fitzgerald, number 762861, together with all benefits and advantages to be derived therefrom, including the right to receive and receipt for the surrender value of said policy, and all dividends or surplus arising thereunder; and I do hereby irrevocably constitute and appoint C. T. Marsden, Treas., my attorney, with full power and substitution and revocation in my name or otherwise, but at his own proper cost, to take all proceedings which may be proper or necessary for the recovery or collection of any sum which may be or become due under the aforesaid policy, and

Md.]

Opinion of the Court.

to discharge, receipt for, compound or release any claim under said policy, and to execute, acknowledge and deliver any instrument in furtherance thereof, and to endorse in my name any check, draft or other paper given in payment for or in liquidation of said claim, and to perform every act, and thing in and about the premises, hereby ratifying and confirming all that said attorney or his substitute may do; and also authorize the said life insurance company to pay the sums due or to become due under said policy to said assignee, his administrators or assigns, without the payment to me of any further consideration. It is hereby expressly understood and agreed that this transfer is not made for the purpose of securing any indebtedness or as collateral security, but with the intent and for the purpose of divesting the assignor of all title to interest in said policy or the proceeds thereof, and of vesting the absolute and unconditional title thereto in said assignee.

Witness my hand and seal, at Princess Anne, in the State of Maryland, on the 26th day of October, 1908.

(Signed) GEORGE B. FITZGERALD. (L. S.)

Signed, sealed and delivered

in the presence of

(Signed) SAMUEL H. SUDLER,

Notary Public."

It is insisted upon the part of the appellants because this assignment was made within a few days after the policy was issued and in pursuance of an agreement to that effect. made prior to its date and because the assignment contains, in part, a stipulation "that the transfer is not made for the purpose of securing any indebtedness or as a collateral security, but with the intent and for the purpose of divesting the assignor of all title to interest in said policy or the proceeds thereof and of vesting the absolute and unconditional title thereto in the assignee," that, therefore, the assignment was a mere device to cover a gaming contract and is void.

We cannot agree to this contention, either in the light of the relations existing between the parties at the date of the policy and of the assignment, or as a proper construction to be placed upon the assignment itself.

There is nothing in the proof to indicate a want of good faith between the parties or to show that the transaction was a mere speculation or a gaming contract. The answer filed by the appellees shows entire *bona fides* on their part and denies that the transfer of the policy was made to cover a gaming transaction. The case at bar is clearly distinguishable from those cited in the brief of the appellants.

The uncontradicted proof in the case shows, that the assignor and the assignees of the policy were merchants, the former engaged in the agricultural implement business, in Princess Anne, Md., and trading under the name of the Princess Anne Farm Implement Company, and the latter were engaged in the same line of business in the City of Baltimore, trading as the Rawlings Implement Company. At the date of the issuing of the policy, and of its assignment, the assignor was indebted to the assignee in the sum of \$536.32/100, and at the death of Fitzgerald, there was an indebtedness of \$1,029.53/100 existing between them, in pursuance of "a line of credit" which had been given the assignor, since the date of the assignment and which appears to have been a part of the consideration for the assignment itself. Besides this, the correspondence set out in the record between the parties prior to, and subsequent to, the issuing of the policy and of the assignment clearly establishes the relations of the parties to the contract, and that the assignees had an insurable interest in the life of the insured. All of the premiums upon the policy were paid by the appellees and this was one of the considerations set out in the assignment to wit, the payment by the assignee of "the premiums then due and to become due and one dollar and other valuable considerations." The proof, in this case, also clearly shows that the policy was issued for the benefit of

Md.]

Opinion of the Court.

the firm, of the Rawlings Implement Company, the appellees, and the assignment was made to more effectually carry out the intention of the parties to the contract. It matters but little under the facts of this case, in so far as the appellants are concerned, whether we treat the policy as having been originally issued to the appellees or subsequently assigned to them, because the appellees had an insurable interest in the life of the insured, the policy was taken out and issued for their benefit and the insured had no interest whatever in it.

In *Rittler v. Smith*, 70 Md. 261, this Court said: "It is settled law in this State that a life insurance policy is but a chose in action for the payment of money and may be assigned as such. *Ins. Co. v. Flack*, 3 Md. 341; *Whitridge v. Barry*, 42 Md. 150."

In this case, it was said, the assignee must of course keep the policy alive by the payment of premiums if he wishes to realize anything from it. Such an assignment is valid in this State, if it be a *bona fide* business transaction and not a mere device to cover a gaming contract. Such is also the English rule.

Nor do we regard as tenable the position urged by the appellants, because the assignment bears upon its face, the statement, that "it is understood and agreed that the transfer is not made for the purpose of securing any indebtedness or as collateral security," that it follows that the assignment is void. In view of the consideration for the policy, of "one dollar and the premiums now due and to become due, and other valuable considerations," expressed in the assignment, and "a line of credit to be given" the insured, these words, simply mean that the assignees of the policy were to hold the entire proceeds of the policy for their own use. The law is well settled in this State, that a creditor who in pursuance of a *bona fide* effort to secure payment of his debt insures the life of his debtor and takes the policy in his own name or for his own benefit, is entitled to the proceeds of the

entire policy. *Emerick v. Coakley*, 35 Md. 193; *Whiting v. Ins. Co.*, 15 Md. 326; *Robinson v. Hurst*, 78 Md. 59; *Rittler v. Smith*, 70 Md. 261; *Souder v. Home Friendly So.*, 72 Md. 511.

In *Rittler v. Smith*, *supra*, it is said, the creditor is in fact the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing in this respect. If he pays the debt to his creditor he has only discharged his duty, and what interest has he in the policy, or in what his creditor may recover upon it. And such we find is also the English rule. *Dalby v. Ins. Co.*, 15 C. B. 365; *Ashley v. Ashley*, 3 Sim. 149; *Bruce v. Garden*, L. R. 5 Ch. App. 32.

Manifestly, if the policy of insurance was a valid one, at its inception, and this is conceded by the company, the assignment of this policy under all the authorities, would be legal, whether to a person having or not having an insurable interest in the life of the insured. A policy of insurance like any other chose in action, can be assigned to a creditor absolutely or in payment of his own debt. *Souder v. Home Friendly Society*, 72 Md. 511; 25 Cyc. 708; *Clogg v. McDaniel*, 89 Md. 416.

The appellants have referred us to several authorities, as sustaining their views, but when carefully examined they will be found not to apply to the facts of this case, or to sustain the construction placed by them upon the assignment here in question.

Upon the whole evidence, we are all of the opinion, that the appellants have failed to sustain their contention that the assignment of the policy of insurance in this case is null and void, and for the reasons we have assigned, the decree of the Circuit Court of Baltimore City, adjudging that the appellees in this case, are entitled to the proceeds of the policy of insurance will be affirmed.

Md.]

Syllabus.

The following cases, in addition to those we have cited, fully support and sustain the conclusion we have reached in this case. *Clark v. Allen*, 11 R. I. 439; *Olmsted v. Keyes*, 85 N. Y. 593; *Amick v. Butler*, 111 Ind. 578; *Johnson v. Van Epps*, 110 Ill. 562; *Appeal of Corson*, 113 Pa. St. 438.

Decree affirmed, with costs to the appellees.

HENRY B. CHRISTHILF ET AL. vs. JOHN W. BOLL-
MAN, TRUSTEE, ET AL.

*Original Lessee Who Covenanted to Pay Taxes Cannot Buy the
Demised Property at a Tax Sale, Although After
Assignment of the Leasehold Interest.*

A lessee who has covenanted to pay the taxes on the demised land, as well as the annual rent, cannot, by purchasing the property at a tax sale, made for non-payment of taxes, become the owner thereof as against the lessor, although he may have assigned the leasehold estate before the tax sale

In this case, after the lessee purchased the property at the sale for non-payment of the taxes which he had covenanted to pay, he conveyed it to his daughter. A bill by the owner of the rent alleged that the conveyance was made in pursuance of a scheme to defraud the plaintiff, and asked that the sale and the deed from the collector to the lessee, as well as the deed from the lessee to his daughter, be declared null and void, and that the plaintiff be declared the owner of the reversionary interest in the land. *Held*, upon the evidence, that the plaintiff is entitled to the relief asked for.

Decided January 10th, 1911.

Appeal from the Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

A. C. Trippe, for the appellants.

William S. Thomas, for the appellees.

PATTISON, J., delivered the opinion of the Court.

On the 19th day of March, 1879, one Wendel Bollman leased unto Henry B. Christhilf, one of the appellants, a lot of land in the City of Baltimore for the term of ninety-nine years, renewable forever, at an annual rent of one hundred and seventy-two dollars, payable semi-annually on the first day of January and of July in each and every year during the continuance of the lease. On the 15th of February, 1884, Wendel Bollman conveyed his reversionary interest in this lot of land unto Ann S. M. Bollman, and on the 22nd day of January, 1887, Ann S. M. Bollman conveyed her interest therein unto John W. Bollman in trust for Elizabeth McMachen, one of the appellees, for and during her natural life, she for such time to receive the rents, issues, incomes and profits therefrom. On the 11th day of November, 1900, John W. Bollman, the trustee named in the last-mentioned deed, died, and was succeeded in said trust by his son, John W. Bollman, one of the appellees.

Upon default in the payment of the State and City taxes for the years 1899, 1900 and 1901, this lot, on the 23rd day of December, 1901, was by James P. Gorter, Collector of Taxes, sold for the payment of the aforesaid taxes, at which sale Henry B. Christhilf became the purchaser at and for the sum of two hundred and fifty dollars, and to whom the prop-

Md.]

Opinion of the Court.

erty was conveyed on the 20th day of July, 1904, by the said Collector. Upon the same day the said Henry B. Christhlf and wife conveyed the same to Katherine M. Christhlf, his daughter, for an alleged consideration of five dollars and other valuable considerations.

The rent for this lot of land was regularly paid by the said Henry B. Christhlf up to and including the payment of July 1st, 1903, but when called upon in January following to pay the rent due January 1st, 1904, he refused to pay, and based his refusal to do so upon the fact that the land had been sold for the non-payment of taxes. This was the first information received by the trustee or Elizabeth McMachen as to such sale.

Thereupon, on the first day of February, the appellees filed their bill alleging all the facts above recited and averring that the deed made by the defendant, Henry B. Christhlf, to his daughter, Katherine M. Christhlf, was in reality made for the benefit of the said Henry B. Christhlf and was made and accepted for the purpose of further complicating the fraud which he, the said Henry B. Christhlf, had perpetrated upon them; and alleging that the tax sale and the deed from Henry B. Christhlf to his daughter constituted a cloud upon the title held by the plaintiffs.

The bill also alleges that at the time of said sale and for a number of years prior thereto this property was assessed to and in the name of Henry B. Christhlf upon the books in the office of the Collector of Taxes, and that he was notified by the Collector of the default in the payment of the taxes and informed that the land would be sold if such taxes were not paid. He did not pay them, but permitted the property to be sold, became its purchaser and subsequently received a conveyance therefor. Nor did he notify the plaintiffs of such default in the payment of taxes or the sale thereunder until January, 1904, although during all this time he was paying them rent therefor under the terms of the original

lease. That the purpose of this concealment was to enable him to procure the fee simple interest in said property, and "that the conduct of the defendant was but part of a scheme to blind them as to the true condition of affairs and to lull them into a sense of security so as to defeat them and those claiming under them of their property and permit the time to elapse when they would have a right under the law to redeem said property from said sale made by the said Tax Collector." And further alleging that it was his duty to pay such taxes, and the payment by him of such money at such sale was but the payment of the taxes and expenses which he was under legal obligation to pay.

The prayer of the bill is: (1) That the said tax sale may be declared void and of no effect; (2) that the aforesaid deed executed by the Collector of Taxes may be declared void and may be vacated; (3) that the aforesaid deed made by Henry B. Christhlf to his daughter, Katherine M. Christhlf, may be declared void and may be vacated; (4) that a decree may be passed declaring the appellees to be seized in fee of the reversion in said lot and to be entitled to collect the rents reserved in said lease from Wendel Bollman.

The defendant, Henry B. Christhlf, answering the bill, alleges that he was not at the time of default in the payment of taxes or at the time of the tax sale the owner of the leasehold interest in this lot of land; that he had not been the owner of it for a period of fourteen years prior to the aforementioned tax sale; that on the 7th day of December, 1887, he sold and assigned his interest therein to his brother, Edward J. Christhlf. In his answer he further alleges that the payment of rent made by him to the plaintiff after the sale and assignment to his brother were not made by him as lessee, but as agent of his brother, the assignee, and denies any liability for the payment of rent since said sale and assignment, and further denies that such payment by him for and on behalf of his brother is any evidence of bad faith

Md.]

Opinion of the Court.

on his part. He also denies all charges of fraud alleged against him in the bill, and avers that the deed to his daughter is valid and is of sufficient consideration to support it. He further alleges, as expressed by him, "that the only possible action against the defendant under the circumstances set forth is a common law suit on the covenant in the original lease and is full and complete, and the complainants have no right of action against the defendant under the bill of complaint in this case."

The other defendant, Katherine M. Christhilf, in answering the bill, admits the execution of the deed to her by her father, Henry B. Christhilf, and alleges that under it she is rightly seized in fee simple of the property therein described. Her answer denies the allegations in the bill as to the alleged object of said deed, and alleges that it was executed to her in good faith and was so accepted by her. She further denies all allegations of fraud alleged against Henry B. Christhilf, and also denies that the plaintiffs are entitled to any relief in equity under the allegations in the bill.

Edward S. Miller, grandson of Wendel Bollman, the original lessor, produced on the part of the plaintiffs, testified that he had, for about twenty years, been collecting the rent for the leased lot in controversy from Henry B. Christhilf for his cousin, Elizabeth McMachen, who was at the time of his testifying about eighty years of age; that the last rent collected by him from Henry B. Christhilf was in July, 1903; that he received from him the rent for said lot of land for the years 1899, 1900, 1901, 1902 and July, 1903. That he did not know said taxes had not been paid or that the property had been sold for taxes until January, 1904. At that time he called upon Henry B. Christhilf for the payment of rent then due, when he was told by him that he did not owe the rent, and when asked why he stated that the property had been sold for taxes and that he had become the purchaser thereof; he at the same time informed the witness

that his brother, Edward J. Christhlf, was the owner of the leasehold interest in the land. This was the first information that he had received as to the alleged ownership of the leasehold interest by the brother. The bills for ground rent were all made out against Henry B. Christhlf, by whom the rent was paid and to whom receipts were given. Upon cross-examination he was asked if he knew from whom Henry B. Christhlf got the money with which to pay the rent; he replied by saying that at times he stated he borrowed it from his wife, although witness did not know from whom he got it; at other times when he would call upon the defendant, Christhlf, for the rent he would be told that he did not have the money and assigned as a reason therefor that the people renting the stalls had not paid their rent.

The defendants did not answer under oath, nor did either of them, though charged with fraud, testify in support of the denials and averments contained in the answers, although called upon to go on the stand by the Court; nor was the assignee, Edward J. Christhlf, placed upon the stand to testify in support of the *bona fides* of the assignment to him.

August E. Christhlf, son and brother to the defendants, when produced by them as a witness, testified that his sister was a trained nurse; that she had paid two hundred dollars on the purchase of the property conveyed to her by her father. On cross-examination he stated that he did not know the date of the purchase, but the date of the payment of the two hundred dollars was March 10th; the year he could not recall. He knew of the payment of the money by his sister from seeing her bank book, which was shown to him by her on Thursday night preceding the date of his testifying. At the time he testified he did not know where his sister was, but supposed she was at home. That he had no personal knowledge of the payment of the two hundred dollars by his sister, but understood her to say that she paid it upon the property. That all he knew about the payment of this money was what his sister had told him.

Md.]

Opinion of the Court.

Christian Berger, a witness offered by the defendants, testified that he rented a portion of the demised premises from Edward J. Christhlf at a rental of ten dollars a month and paid the rent to him, Edward Christhlf, when it was convenient to pay him; "he (Edward J. Christhlf) works right above, at Albaugh's blacksmith shop, and he receipts for it." He did not say to whom he paid it when it was not convenient for him to pay to Edward J. Christhlf.

Thomas Gross, negro man, testified that he rented a part of the property from Edward J. Christhlf and paid to him the rent therefor, amounting to three dollars a month; that it consisted of stall room and was in bad condition; that he had paid the rent up to the month just preceding the last month.

We have given practically all that was said by the witnesses offered by the defendants in support of the position taken by them and in denial of the charges of fraud alleged against them.

Upon the submission of the case the Court below, after hearing the testimony, passed an order or decree by which the tax sale and the deed from the Collector to Henry B. Christhlf and the deed from Henry B. Christhlf and wife to Katharine M. Christhlf were declared null and void, and adjudged and decreed that the plaintiff, John W. Bollman, trustee, and his successors in trust, was seized in fee of the reversionary interest in the lot of land in controversy, with the right to collect the rent reserved in the lease. It is from this order or decree that this appeal is taken.

The facts of this case differ but little from those in the case of *Oppenheimer v. Levi*, 96 Md. 296, and the relief sought is the same. In that case the purchaser of the land at the tax sale was the assignee of the leasehold estate of which he was the holder at the time of the default in the payment of the taxes and for which default the sale was made. In this case the purchaser is the lessee under the

original lease, but was not, as he alleges, the holder of the leasehold interest in the land at the time of the default in the payment of the taxes, in consequence of which the sale was made. In this case it is contended, as it was in the *Oppenheimer case*, that the plaintiffs were not entitled to obtain the relief sought in a Court of Equity. The Court, however, in that case held that they were properly in a Court of Equity and were entitled to the relief sought. The ruling in that case disposes of the contention made by the defendant in this case.

In that case this Court, speaking through JUDGE PEARCE, said: "There are well-established legal principles, applicable to the facts of this case, which, in our opinion, take it out of the general rule and bring it within the exceptions in which equity has jurisdiction. These principles cannot be better stated than in the language of JUDGE COOLEY, extracted from his *Law of Taxation*: 'Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers on grounds which are apparent when their relation to the property and to the taxes is shown. The title to be given on a tax sale is a title based on the default of the person who owes to the public the duty to pay the tax, and the sale is made by way of enforcing that duty. But one person may owe the duty to the public and another may owe it to the owner of the land by reason of *contract* or other relations. Such a case may exist where the land is occupied by a tenant who, by his lease, has obligated himself to pay the taxes. Where this is the relation of the parties to the land, it would cause a shock to the moral sense if the law were to permit this tenant to neglect his duty and then take advantage thereof to cut off his lessor's title by buying in the land at a tax sale.

" 'There is a general principle applicable to such cases, which may be stated thus: That a purchase, made by one whose duty it was to pay the taxes, shall operate as a pay-

Md.]

Opinion of the Court.

ment only; he shall acquire no right as against a third party by a neglect of the duty which he owed to such party. This principle is universal and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty and the disqualification is made out in every instance.' ”

If it be true that the defendant, Henry B. Christhilf, was not the owner or holder of the leasehold interest at the time of default in the payment of taxes and at the time he became the purchaser of the land at the tax sale, will this fact remove him from the class of persons that are prohibited from buying at tax sales by reason of an obligation or duty resting upon them to pay such taxes? He was certainly within this class so long as he was the holder of the leasehold estate. In the lease to him of this land from Wendel Bollman he expressly covenanted for himself, his heirs, executors, administrators and assigns, to pay during the term of the lease, the taxes and assessments thereon when legally demandable. Was he relieved from his obligation or covenant to pay the taxes after the assignment of the leasehold interest to another? If not, he could not become the purchaser of the property at the tax sale made in consequence of his failure to pay such taxes, and any sale to him would be void and operate only as a payment of taxes owing thereon. For, as above quoted, the purchase made by one whose duty it was to pay the taxes shall operate as a payment only, and he shall acquire no right as against the third party by neglect of a duty which he owed such party. “Show the existence of the duty and the disqualification is made out in every instance.”

“An assignment of the term and the acceptance of the assignee as tenant discharges the lessee from all obligations arising from privity of estate, but not from those arising from *privity of contract*, notwithstanding the assignee may have become liable by privity of estate, unless there is an agreement by which a new tenancy is created.” *Cyc.*, Vol.

24, 280. "Express covenants running with the land and entered into by the lessee for himself, his heirs, executors, administrators and assigns, binds him during the term, though broken after he assigns over and after the acceptance of the rent by the lessor from the lessee." *Alexander's British Statutes*, 352.

In the case of *Boyle v. Peabody Heights Co. of Baltimore City*, 46 Md. 623, the assignee of the lease filed a bill asking for a new lease to be executed by the lessor before the expiration of the existing lease, under a covenant contained therein. The lessor admitted its obligation under the covenant to execute a new lease to take effect after the expiration of the term originally created, but denied that it was bound to execute a lease to take effect before that time, covering a portion of the time embraced in the original lease. He resisted the execution of a new lease on the ground that the lessee, who was not to be made a party to the new lease, would be released from his covenants in the original lease. In speaking of this contention this Court said: "It (the lessor) contends, and there can be no question of the soundness of the position, that if the new lease demanded should be executed without making Gosman (the lessee) a party thereto, the original lease would be destroyed and he would be absolved from his covenant to pay the rent, *as well as from the other covenants on his part which the lease contains, whereas if no new lease be executed he will remain liable on these covenants notwithstanding his assignment to the appellant.*"

From the above authorities, it is clear that the obligation or covenant of the lessee, the appellant, to pay the taxes during the term was still binding upon him at the time of the default in the payment of the taxes, and as the sale was made by reason of such default, which was in fact his default, he could not become the purchaser of the property at such sale. Moreover, the liability of Henry B. Christhilf

Md.]

Syllabus.

for the payment of the taxes is admitted by him in his answer to the bill.

As stated above, this property upon being sold and conveyed by the Collector of Taxes to Henry B. Christhilf, was by him, upon the same day, conveyed unto his daughter, Katherine M. Christhilf. The bill charges fraud against both the grantor and the grantee in connection with the purchase of this land by the father at the tax sale and the conveyance of the same by him to his daughter, and prays that the deed conveying the land to the daughter, as well as the deed to him, be declared null and void. We do not think it is necessary to discuss at length the facts in this case in relation to such alleged fraud, but will content ourselves by saying that the conduct of the appellant and his daughter, the grantee, was not such as to impress the Court with the *bona fides* of the transaction. On the contrary, we think that the charge of legal fraud made against the defendants has been sufficiently established.

We find no reversible errors in the rulings of the Court upon the exceptions to the testimony, and will therefore affirm the order or decree of the Court below.

Decree affirmed, with costs to the appellee.

BETTENDORF AXLE COMPANY *vs.* CHARLES W.
FIELD ET AL., EXECUTORS OF GEORGE
A. VON LINGEN.

Constitutional Law—Change in Remedy Given to Creditors of Corporation Against Stockholders by Act 1908, Chap. 305.

Prior to the Act of 1908, Chap. 305, each creditor of a corporation was entitled to bring an action at law against any stockholder therein who had not fully paid his subscription

for the stock, and the creditor could recover from him to the extent of the balance due on the stock subscription. The Act of 1908, Chap. 305, provided that the liability of stockholders to creditors of the corporation should be enforced only by bill in equity on behalf of all the creditors against all the stockholders. After the passage of this Act, plaintiff instituted suit against the defendants to enforce their liability for unpaid subscriptions for the capital stock of the corporation of which the plaintiff was a creditor. *Held*, that this Act is constitutional and did not impair the obligation of the contract within the meaning of the Federal Constitution, since it afforded to the creditors of the corporation a more efficient remedy against the stockholders than that which previously existed.

Held, further, that the existing rights of the creditors of the corporation against stockholders were not affected by the general corporation law, Act of 1908, Chap. 240, which contained a provision expressly reserving their rights against stockholders.

Decided January 11th, 1911.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was submitted to the Court on briefs by:

J. Kemp Bartlett, L. B. Keene Claggett and R. Howard Bland, for the appellant.

Charles W. Field, for the appellees.

BRISCOE, J., delivered the opinion of the Court.

This is a submitted case, and the appeal is from a judgment, of the Superior Court of Baltimore City in favor of the defendants for costs.

Md.]

Opinion of the Court.

The suit was instituted, by the appellant, as a creditor of the South Baltimore Steel Car and Foundry Company, a corporation of the State, against the appellees as executors of George A. Von Lingen, a stockholder, of the corporation.

The declaration contains seven counts, six in assumpsit, and the seventh a special count, as follows. And for that the plaintiff is a creditor to the South Baltimore Steel Car and Foundry Company, a body corporate of the State of Maryland, organized and existing under the General Laws of the State, in the sum of twenty-four thousand eight hundred and eighty-four dollars and ninety cents (\$24,884.90); and that the defendants were prior to, are, and have been, during all the time that the plaintiff has been a creditor of the company, original stockholders of the South Baltimore Steel Car and Foundry Company, and as such were prior to, are, and have been, during all of the period the owners and holders of one hundred and eighty (180) shares of the preferred capital stock of the par value of one hundred dollars (\$100) per share (the preferred capital stock being of the class known as ordinary or pure preferred capital stock and was not issued under or in accordance with section 408 of Article 23 of the Code of Public General Laws of the State of Maryland of 1904), and two hundred and fifteen (215) shares of the common capital stock of the said company of the par value of one hundred dollars (\$100.00) per share, upon which preferred and common stock there is a balance due and unpaid of nine thousand dollars (\$9,000.00) with interest from February 1, 1906; the capital stock so, as aforesaid, held and owned by the defendants, having a par value of thirty-nine thousand, five hundred dollars (\$39,500.00), being nine thousand dollars (\$9,000.00) in excess of all sums paid by the defendants or by any one for or on account of the defendants to the company for the shares; the shares having been acquired by the defendants by subscription or purchase from the South Baltimore Steel Car and

Foundry Company, and the defendants are as to the shares original stockholders having had at all times knowledge that the stock was not fully paid and of the extent of the non-payment.

And the plaintiff claims eighteen thousand dollars (\$18,000.00).

To this declaration, the defendants pleaded the general issue pleas of never indebted as alleged, and never promised as alleged. For a third plea they allege, that the cause of action did not accrue within the three years before the suit. And for a fourth plea, to the seventh count of the declaration, they say, that the alleged indebtedness of the defendants or of their testator to the South Baltimore Steel Car and Foundry Company for the purchase of stock therein, did not accrue within three years before this suit.

And for a fifth plea to the seventh count of the declaration, they say that the one hundred and eighty (180) shares of the preferred capital stock of said South Baltimore Steel Car and Foundry Company, referred to in the count, were issued under and in accordance with section 408 of Article 23 of the Code of Public General Laws of the State of Maryland of 1904, and were full paid and non-assessable shares in accordance with the section of the Code; and that the two hundred and fifteen (215) shares of the common stock of the company, referred to in the count, were also full paid, non-assessable shares in the company, in accordance with the law, and that no sum whatsoever was ever due to the company thereon by the defendants or their testator, George A. Von Lingen, at and prior to the institution of this suit.

On the 10th day of May, 1910, the defendants, the appellees here, moved the Court that the suit be declared abated and dismissed, for the following reason. That this is a suit by a creditor of a corporation to enforce the liability of one of its stockholders therein, and that Chapter 305 of Acts of 1908 of the General Assembly of Maryland provides that

Md.]

Opinion of the Court.

the exclusive remedy for the enforcement of such rights shall be by bill in equity, and that the law by its terms became operative as of July 1st, 1907, and further declared that it shall cause the abatement of all actions at law, which should have been brought against stockholders since that date, and that this suit was brought subsequent to July 1st, 1907, and in fact, was brought more than eighteen (18) months after the passage of the above-named Chapter 305 of the Acts of Assembly of 1908; and after the statute had been in full force and effect; and the action should, therefore, be declared abated.

This motion to abate was granted by the Court below, and on the 10th day of May, 1910, the suit was directed to be abated and dismissed and a judgment entered for the defendants for costs.

The single question then raised on the record and presented for our consideration is the constitutionality of the Acts of 1908, Chap. 305—that is, first, whether the retrospective provision of the Act of 1908, Chap. 305, is valid, and secondly, if it is valid, then was that Act superseded by Chapter 240 of the Acts of 1908 (the new General Corporation Law), which became effective June 1st, 1908.

By the Act of 1908, Chap. 305, sec. 64 of Article 23 of the Code of 1888, title “Corporations,” was repealed and re-enacted, and a new section known as 64 A was added. This section reads as follows:

“64 A. The exclusive remedy for the enforcement by creditors against stockholders of all rights existing under the preceding section 64, as the same stood prior to the time of the passage of this Act, and which were declared by said section as amended by this Act not to be affected by the terms thereof as herein amended, shall be, as against stockholders residing in the State of Maryland, by bill in equity in the nature of a creditor’s bill filed against such stockholders by one or more creditors on behalf of themselves and all other

Opinion of the Court.

[114]

creditors of the corporation who may come in and make themselves parties thereto, in a Court having jurisdiction within the limits of the county or City of Baltimore, in which, as the case may be, the principal office of the corporation is situated at the time of the filing of the bill, or in case any such corporation has, by reason of having been placed in the hands of a receiver, or from any other cause, ceased to have any principal office at the time of the filing of the bill, then the bill shall be filed in a Court having jurisdiction within the limits of the county or the City of Baltimore in which, as the case may be, the said corporation had its last principal place of business; and to any such bill stockholders residing beyond the limits of the State of Maryland may become parties defendant, and upon so becoming parties, shall not be proceeded against in any other State or territory or in the District of Columbia, in respect of any liability imposed by the said section 64, as said section stood before the repeal thereof, and which existed at the time of the passage of this Act hereinbefore referred to. This section shall become operative as of July 1st, 1907, and shall cause the abatement of all actions at law which shall have been brought against said stockholders since that date to enforce any repeal thereof, and which existed at the time of the passage of this Act, hereinbefore referred to; provided, however, that as to any plaintiff or plaintiffs in any of said abated suits, who shall, within sixty days from the passage of this Act, become a party or parties to a bill in equity of the character mentioned in this section, then, as regards the operation of the Statute of Limitations upon the claims so sued on, the time elapsed between the institution of said abated suits and the time of such plaintiff or plaintiffs becoming a party or parties to said bill in equity shall be included in ascertaining the period within which suits are required to be brought by the said Statute of Limitations. the costs taxable to any plaintiff or plaintiffs in any action at

Md.]

Opinion of the Court.

law which shall be abated under the provisions of this section, the plaintiff or plaintiffs in which action shall become a party or parties to a bill in equity under the provisions of this section, shall become a part of the costs taxable in the proceedings in said equity case."

This Act, it will be seen was approved on April 6th, 1908, and this suit was not brought by the appellant, until the 19th day of November, 1909.

It is quite clear, then that if the law is constitutional that the remedy sought by this suit, no longer existed, because under the terms of the Act, all actions at law by creditors of such corporations against stockholders to enforce their stockholders liability since July 1st, 1907, should be abated, and all actions at law, for the enforcement of such liability instituted after that date and prior to the passage of the Act, should be abated. A bill in equity was made the exclusive remedy for the enforcement by creditors of corporations of the liability to them of the stockholders for any unpaid balances due on this stock.

The old remedy at law was abolished by this Act, and a suit in Chancery substituted in its place.

Now it is admitted, by the appellant and appellee, in their briefs that the questions raised on this appeal, are identical with those raised, passed on and determined by us, in the recent case of *Pittsburg Steel Co. v. Baltimore Equitable Society*, decided by us, on March 31st, 1910, 113 Md. 77. Upon reference to that case, we find this to be correct. The case was then heard and determined by all of the Judges of this Court, after full and careful argument upon the part of the appellant and appellee, and is now pending on appeal, from this Court to the Supreme Court of the United States, upon writ of error dated the 27th of June, 1910.

In that case, we held the Act of 1908, Chapter 305, to be valid and constitutional and upon a second consideration of the same questions we find no reason to disturb or overrule

the decision then made, but hold it to be conclusive upon the issue presented in this case.

We said in the *Pittsburg Steel Co.'s case*, *supra*, that we had occasion to pass upon the constitutionality of a statute having a precisely similar operation to the one now before us in the case of *Miners Bank v. Snyder*, 100 Md. 57, and held it to be valid. It was also said, neither the Acts of 1904, Chapter 337, in issue in the *Miners Bank case*, nor the Acts of 1908, in issue here give to the creditor suing the stockholder at law any lien or priority, by reason of having brought suit, upon the debt due by the defendant stockholder or to the corporation. Nor does the entry of suit by one creditor exclude the other creditors from suing the same stockholder and recovering the entire debt due by him, if they can secure earlier judgments. It is the recovery of judgment, not the entry of suit, that gives to the suing creditor the exclusive right to the debt due by the defendant stockholder. In *Garling v. Bechtel*, *supra*, it was held that the mere bringing of suit by one creditor against a stockholder does not constitute a defense to a suit by another creditor. It was further said, the laws creating the liability of the stockholder, which were in force at the time of the passage of the Acts making the remedy in equity exclusive were silent as to the remedy. The practice of enforcing the liability by an action at law grew up under the decisions of this Court which held the liability to be a debt due under the statute by the stockholder, and therefore recoverable at law. The Act also contains a provision touching the running of limitations against the claims of creditors which had been sued on at law prior to its passage; but, as it does not appear from the record that the rights of the appellant are affected thereby, he cannot be heard to raise the question of its constitutionality. *A. & E. Encyc.*, Vol. 6, page 1090; 8 *Cyc.*, 787, 788; *Red River Valley Bank v. Craig*, 181 U. S. 558, 21 Sup. Ct. 703, 45 L. Ed. 994; *Lampasas v. Bell*, 180 U. S. 283, 284, 21 Sup. Ct. 368, 45 L. Ed. 527;

Md.]

Opinion of the Court.

Phinney v. Sheppard & Enoch Pratt Hospital, 88 Md. 639, 42 Atl. 58; *Joesting v. Ballimore*, 97 Md. 594, 55 Atl. 456.

We do not think that Chapter 240 of the Acts of 1908 affects the status of the present suit or the rights of the parties to it. That Act, as its title declares, was passed to revise the corporation laws of the State by repealing certain specified sections of Article 23 of the Code of 1904 and substituting new sections in their stead. By it sections 1 to 92 of Art. 23 are among those repealed for which new sections numbered from 1 to 79, inclusive, are substituted. The new sections make some changes in the nature and extent of the liability of the stockholders of a corporation to its creditors, but section 79 distinctly saves all existing rights and remedies of creditors and stockholders as of June 1, 1908, in comprehensive terms. It says: "Nothing herein shall release, affect or impair the rights of any creditor or creditors of any corporation or the obligations or liability of any corporation or of any stockholder or of any corporate officer existing on the said first day of June, in the year nineteen hundred and eight (1908) or the remedies to enforce or protect the same." Chapter 240 of the Acts of 1908 did not take effect until June 1, 1908, but Chapter 305 by its express terms took effect from the date of its passage. It was approved by the Governor on April 6, 1908, and was therefore in operation prior to June 1, 1908, and the rights and remedies conferred by it on creditors of corporations against their stockholders were within the saving clause of section 79 of Chapter 240.

In the case at bar, it will be seen that the suit was not brought until eighteen months after the Act had been passed, whereas in the *Pittsburg Steel Company case* the action had been brought months prior to the passage of the Act.

We, therefore, hold in this case for the reasons stated and for the reasons more fully considered in the *Pittsburg Steel Company case*, *supra*, that the Act of 1908, Chapter 305, is not invalid as impairing the obligations of a contract

under section 10 of Article 1 of the Federal Constitution, because it gives the creditor an alternative remedy in equity equally as adequate and efficacious. *Siebert v. Lewis*, 122 U. S. 284; *Bryan v. Virginia*, 135 U. S. 693.

The judgment will be affirmed with costs.

Judgment affirmed, with costs.

PIEDMONT AND GEORGE'S CREEK COAL COMPANY vs. CHARLES D. KEARNEY.

*Right of Owner of Surface Land to Subjacent Support from
Owner of Minerals Under Land—Removal of Coal Causing
Cracks in Surface of Land, Reducing Moisture,
and Causing Permanent Injury to Buildings—
Evidence—Measure of Damages.*

When one person owns the coal or other minerals in their natural bed under land, and another person owns the surface of the land, the latter has a right of subjacent support of the surface, and the owner of the minerals in removing them is bound to do so without injury to the surface or to the buildings on it.

The right of the owner of the surface to support as against the owner of minerals may be modified by the expressed terms of the grant of the land to him.

When a grant of land reserves to the grantor all coal and other minerals in the land, together with the right to mine and remove the same, the right of the grantee to subjacent support is not released or extinguished, either in express terms or by necessary implication.

The owner of the coal is not liable to the owner of the surface for injuries resulting from the diversion of hidden or percolating streams caused merely by the removal of the coal.

Md.]

Syllabus.

But if in removing the coal the surface of the land is made to crack in different places so that the rain runs into the crevices and the soil ceases to retain moisture, this loss of moisture diminishes the value of the land for agricultural purposes, and is an element of the damages which the owner of the surface is entitled to recover.

When the evidence does not show that the removal of coal by a third party from land adjacent with the plaintiff's and on a lower level had any effect on plaintiff's land from beneath which plaintiff removed coal, a prayer is properly refused which instructs the jury that if plaintiff's land was liable to slip in that direction, and that the injury was caused by the working of the neighboring mine, then the plaintiff cannot recover. The prayer is also defective in that it does not exclude defendant's participation in the injury.

When the plaintiff has shown that his land, from under which defendant removed coal, cracked in many places; that cracks and crevices also appeared in the walls of the dwelling house, barn, etc., evidence is admissible to show what the market value of plaintiff's house was before it was damaged, and its value afterwards, and what injuries the removal of the coal had occasioned.

When the injury to the plaintiff's land and house caused by the defendant's wrongful act in removing the subjacent support is permanent in its nature, the measure of damages is the diminution in the market value of the property, and not the cost of repairing it, when such cost would be greater than the diminution in value, or when the repairing of the house would be practically impossible.

Decided January 11th, 1911.

Appeal from the Circuit for Allegany County (HENDERSON, J.), where there was a judgment on verdict for the plaintiff for \$1,500.

Plaintiff's Second Prayer.—If the jury find for the plaintiff then in estimating the damage the jury are to consider

the market value of the premises before the happening of said injuries as compared with the present market value of said premises in so far as they may find the market value has been reduced by injuries to the surface and to the improvements thereon, as set out in the plaintiff's first prayer. and allow to the plaintiff such damages as will compensate him for such injuries to his property. (*Granted.*)

Plaintiff's Third Prayer.—Even if the jury find that the defendant mined and pillared the coal under the said premises in a skillful manner, yet if the jury find that the defendant in such mining failed to leave sufficient support for the surface and that thereby the injuries were caused, then the plaintiff is entitled to recover. (*Granted.*)

Defendant's Second Prayer.—That the jury cannot under the pleadings and evidence in this cause allow anything for the reduction of moisture in the surface, even though they should believe that the reduction of the moisture in the land was the direct result of the mining of the coal under the land of the plaintiff. (*Rejected.*)

Defendant's Third Prayer.—If the jury shall believe that the damages claimed to have been done to the property of the plaintiff were occasioned by a slip in the hill upon which the plaintiff's land was situated, then the plaintiff is not entitled to recover in this cause; provided they further find that said slip in the hill was caused by natural causes or by causes over which the defendant had no control or by both of said causes together, and not by the defendant undermining and pillaring said coal. (*Granted as modified.*)

Defendant's Sixth Prayer.—If the jury shall find that the pillaring of the coal under the house and barn of the plaintiff was completed by the first day of August, 1906, and that the pillaring under the remainder of the plaintiff's property was completed by the first day of February, 1907, and that as soon as the pillaring was done the roof of the mine broke down as was testified to by the witnesses, and that the cover over the vein of coal worked by the defendant was about four

Md.]

Statement of the Case.

hundred feet in thickness, and that no cracks appeared in the surface until May, 1907, and that subsequently to the pillaring by the defendant that the Davis Coal & Coke Company pillared its mines, and that following the pillaring of the mines of the Davis Coal & Coke Company the cracks appeared in the plaintiff's property, and that the property of the Davis Coal & Coke Company lay down the hill from the land of the plaintiff and on a lower level, and that the strata of rock dipped down from the land of the plaintiff towards the land of the Davis Coal & Coke Company on a grade of from ten to twenty feet in the hundred, and that the strata were composed of a series of coals, limestones, cres, shales, sandstones and fireclays, and that there was a liability to slip in such strata one over the other, then if the jury should find that the damage to the plaintiff's property was caused by the working of the mines of the Davis Coal & Coke Company, the plaintiff cannot recover in this cause. (*Rejected.*)

Defendant's Seventh Prayer.—If the jury shall find that there were cracks in the hill through the property which the plaintiff now owns, or immediately above the same up the hill from said property, some 14 years ago, and that said cracks appeared before any of the lower seams of coal under the plaintiff's property or any of the adjoining property had been worked, and that there was a tendency, on account of the formation of the hill on which the plaintiff's property was located to slip and slide, and if the jury should find that the injury to the plaintiff's property was occasioned by the slipping and sliding of the hill, then they cannot find a verdict for the plaintiff in this cause. (*Rejected.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Ferdinand Williams and *D. Lindley Sloan*, for the appellant.

Albert A. Doub (with whom was *A. Taylor Smith* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee sued the appellant for damages alleged to have been sustained by him by reason of the appellant removing the coal which supported the surface owned by him in a tract of land containing fourteen acres. The property was conveyed to the plaintiff in 1897, "except, however, all coal and other minerals on or underlying said above granted property to the same extent and in like manner as excepted in the said deed from Maria Reese *et al.* to Daniel Ritchey and Stewart Arnold, above described." In the deed referred to is this reservation: "The parties of the first part reserve to themselves, their heirs and assigns, all coal and other minerals that have been or may hereafter be found on or in the said lands, together with the right to mine and remove the said coal or minerals at such place or places as may appear to them, the said first parties, their heirs or assigns, most suitable and convenient by tramroad, plane and dump houses or otherwise," etc.

The first four bills of exception embrace rulings of the trial Court on the admissibility of evidence, and the fifth presents its action on the prayers. The plaintiff offered three prayers, which were granted, and the defendant offered eleven, the first, fourth, fifth, tenth and eleventh of which were granted as offered and the third and eighth as modified, and the second, sixth, seventh and ninth were rejected.

Before passing on the exceptions separately, it will be well to ascertain what the law is as between the owner of the surface and the owner of the minerals, when those estates have been severed by such provisions or reservations as those now before us. This is the first time this Court has been called upon to pass on the doctrine of subjacent support, where the surface and subjacent estates are owned by differ-

Md.]

Opinion of the Court.

ent persons. The general rule of law is that when the estate in minerals "in place," as they are sometimes spoken of in their natural bed, is severed from the estate in the surface, the owner of the latter has an undoubted right of subjacent support for the surface, and the owner of the estate in the minerals is entitled to remove only so much of them as he can take without injury to the surface, unless otherwise authorized by contract or statute. There have been some discussions in the books as to the reasons upon which the rule was founded, but we have seen no case in which it has been unqualifiedly denied. Even in *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. Rep. 24, 2 L. R. A., N. S., 1115, which has gone as far in sustaining the right of the owner of the minerals to remove all of them as any decision we have found, the general doctrine is recognized.

Without referring to the English cases upon which the original decisions in this country were based, the general rule announced above is sustained by many of the Courts of this country—the cases in Pennsylvania, where so much mining has been done, being especially numerous. Amongst others are *Williams v. Gibson*, 84 Ala. 228, 4 So. Rep. 350; *Colinsville Granite Co. v. Phillips*, 123 Ga. 830, 51 S. E. 666; *Wilms v. Jess*, 94 Ill. 464; *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335; *Yandes v. Wright*, 66 Ind. 319; *Mickle v. Douglas*, 75 Iowa, 78, 39 N. W. 198; *Erickson v. Michigan Land & Iron Co.*, 50 Mich. 604, 16 N. W. 161; *Chicago, etc., R. Co. v. Brandau*, 81 Mo. App. 1; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538; *Burgner v. Humphrey*, 41 Ohio St. 340; *Jones v. Wagner*, 66 Pa. 429; *Coleman v. Chadwick*, 80 Pa. 81; *Carlin v. Chappel*, 101 Pa. 350; *Williams v. Hay*, 120 Pa. 485; *Pringle v. Vesta Coal Co.*, 172 Pa. 438, 33 Atl. 690; *Robertson v. Youghioghenny River Coal Co.*, 172 Pa. 566, 33 Atl. 706; *Noonan v. Pardee*, 200 Pa. 474, 55 L. R. A. 410, 50 Atl. 255; *Youghioghenny River Coal Co. v. Allegheny National Bank*, 211 Pa. 319, 60 Atl. 924; *Miles v.*

Penn. Coal Co., 217 Pa. 449, 63 Atl. 1032 (annotated in 10 *Am. and Eng. An. Cases*, 874). A number of the English cases are cited in the notes to *Trinidad Asphalt Co. v. Ambard* (1899), A. C. 594, to be found in 6 *Am. and Eng. Dec. in Eq.* 643, and in some of the cases referred to above, and we will not make further reference to them.

Although the rule has been so generally adopted, the parties can modify it or avoid its application by inserting provisions in the grants or leases which, expressly or by necessary intendment, relieve the owners of the minerals of the duty to furnish subjacent support, and in many of the cases which have been before the Courts, the question has been whether that was done by the particular provisions, and, if so, to what extent. We have quoted above those which must govern in this case.

There are many decisions in which provisions very similar to these have been held not to be sufficient to relieve the owners of the minerals of their duty to support the surface. In *Mickle v. Douglas*, *supra*, there was a lease with the right to mine, "all the coal;" in *Burgner v. Humphrey*, *supra*, there was a grant of "all the mineral, coal, iron ore, limestone, and all other minerals," with the right to enter upon the land and search and explore thereon for said minerals, coal, etc., "and when found to exist on said land to dig, mine, and remove the same therefrom;" in *Horner v. Watson*, 79 Pa. 242, the grant was all the coal, with the right to enter on the lands for the purpose of "mining, excavating and removing said coal;" in *Carlin v. Chappel*, *supra*, the deed of the surface reserved "all the coal," with the right of ingress, egress and regress, "for digging, mining, excavating and conveying away said coal;" in *Weaver v. Berwind-White Coal Co.*, 216 Pa. 195, 65 Atl. 545, the grant was for "all the merchantable coal in and underlying all that tract of land" for which the right of surface support was claimed, excepting five acres under the buildings and spring, the usual mining rights, were granted "with the

Md.]

Opinion of the Court.

right to mine and carry away all the said coal, and with all the mining rights and privileges necessary or convenient to such mining and removal of the same." See also *Dignan v. Altoona Coal and Coke Co.*, 222 Pa. 390, 71 Atl. 845, one of the latest on the subject.

In those cases it was held that the right of subjacent support was not released in express terms or by necessary implication by the words used. Many others in accord with that position might be cited, but we will only refer to the note in *Griffin v. Fairmont Coal Co.*, 2 L. R. A. N. S. 1115, and the note to *Miles v. Penna Coal Co.*, 10 Am. & Eng. An. Cases, 874, where many of them are collected. The case of *Miles v. Penna. Coal Co.* is an illustration of how such right can be released, while on the other hand that of *Youghio-gheny River Coal Co. v. Hopkins*, 198 Pa. 343, 48 Atl. 19, shows how careful that Court is to sustain the right, unless it is released by express words or necessary implication. The case of *Griffin v. Fairmont Coal Co.*, *supra*, is the only one we have found where language similar to that in the reservation in the deed now before us was held to be a release. When the doctrine or right of subjacent support is recognized, as it is with practical unanimity by the authorities, it seems to us to be far better to require those who desire to enter into stipulations by which the one party to the transaction is to part with the right which the law gives him, and the other is to be relieved of a duty which the law imposes upon him, to use language that will necessarily import or clearly express such intention. It should be either by express words or necessary implication, and in our judgment the language used in this reservation was not sufficient to relieve the appellant of its duty to support the surface. It is also held by the authorities that a failure to leave sufficient support for the surface is negligence and may be so declared on. *Yandes v. Wright*, *supra*; *Jones v. Wagoner*, *supra*; *Carlin v. Chappel*, *supra*.

Having thus ascertained the rights and duties of the respective parties to this suit, by reason of the ownership of the surface by the plaintiff and the coal by the defendant. we will now consider the particular grounds of complaint urged against the rulings of the Court by the appellant. The first and second exceptions and the defendant's second prayer may be considered together. In the examination of the witness, Jacob D. Wilson, he was asked this question: "Was there any difference in the surface as to moisture before and after the fall and breaks of the surface?" That was objected to, and the plaintiff proffered to show, "that the breaks or falls were such that every time it rained the rain ran down these crevices or spaces in the breaks and ran off the surface; and the result was that the land would not hold any moisture. It would dry out immediately afterwards, and the soil became in a hard condition that would amount to a drought, except at such times of continued rain. The land would not hold any moisture, and therefore ruined and of no value." The objection was overruled and that ruling constitutes the first bill of exceptions. The witness answered, "Yes, sir; it was," and then followed this testimony: "Q. What was the difference? A. The steam comes up these cracks, as I told you, and snow all melts, and it don't hold no moisture—the water goes straight through. Q. Where does the water go when it rains? A. Down those cracks. Q. Do you mean to say it is drier afterwards? A. Yes, sir; it used to be two or three days before I could plow, but now I can plow the next day." He had previously described the breaks with particularity.

When Miss Kearney, plaintiff's sister, was on the stand. she described the cracks, which she said they first noticed in May, 1907: She said they "started over towards the barn and ran across the level, and stopped for a long time." "Then it started and went down behind the barn." She "was milking in the barn at the time and the wall split open and a tin cup went down sidewise into the crack. The barn

Md.]

Opinion of the Court.

tipped over four or five inches on one side of the foundation. No other disturbance for two months, when another crack came in the foundation, one that you could stick your finger in. About a year afterwards the house began to crack. It has kept up more or less ever since. Just a week ago the ground opened just below the house—took several panels out of the fence.” She was asked the question: “How does the soil seem to be now as compared to what it was before the injury as to moisture—I mean the soil generally?” That was objected to and the same proffer was made as above, in reference to the witness Wilson. The objection was overruled and the witness answered, “That the soil had dried out, was hard, much harder than formerly, and they now have to water it.” She said the cows would step into the cracks and hurt their legs—that the break took a whole row of trees. She also said, “When it rains, there is no stop to it. It seems like it runs down the cracks.” “The cracks are so large that a wagon could run through. It just looks like a wagon road running through. They open up on this side, and go a little piece, and then on the other, and the middle piece drops in.” “Something like steam or smoke or fog rises from the holes, or crevices at times. You can drop a rock down and hear it sound as if it came from the depths of the earth.”

The defendant by its second prayer asked the Court to instruct the jury “that they cannot under the pleadings and evidence in this cause allow anything for the reduction of moisture in the surface even though they should believe that the reduction of the moisture in the land was the direct result of the mining of the coal under the land of the plaintiff.” It will be observed that that prayer asked the Court to instruct the jury that they could not “allow anything for the reduction of moisture in the surface.” The testimony shows that the depth of the cover was three hundred and fifty or four hundred feet, and it was admitted at the opening of the case that “all the coal to a depth of six feet

under the plaintiff's property was removed by the defendant company after the year 1906, and that no stumps or pillars were left, and that this was done before the injuries to the surface." The rule is well established that the owner of the coal is not liable to the owner of the surface for injuries resulting from the diversion of what are spoken of as hidden streams, caused merely by the removal of the coal. In *Coleman v. Chadwick*, 80 Pa. 87, relied on by the appellant, the Court said: "So far as we can judge from the record, the loss of the plaintiff's springs was occasioned by the ordinary operation of mining, and would have occurred though no part of the surface had been broken. Mining must interfere, more or less, with those subterranean streams and percolations of water which appear upon the surface as springs; to say that the owner of the substrata shall be accountable in damage for their disturbance, is to say that he shall have no use whatever of his minerals, for, without interfering to some extent with such waters, mining is impossible." That seems to us to be a very sensible and necessary rule to adopt.

But the principle referred to in *Coleman v. Chadwick* does not reach the question here involved, for, conceding to its full extent that no damage can be recovered for the diversion of the water, if the coal is worked in the ordinary and proper way, if it is so worked as to take away the support of the surface, then it is not worked in a proper way. This prayer proposed to disallow anything for the reduction of moisture in the surface, while it must be clear that if the loss of moisture is the result of the breaks in the surface, caused by want of the support which the defendant owed the plaintiff's surface, then the loss of moisture is like any other damage which is the result of that wrong done the plaintiff. The prayer was too broad.

The cases in Pennsylvania show the distinction we have pointed out. In *Kistler v. Thompson*, 158 Pa. 139, 27 Atl. 874, the Court said: "Nothing could be more clear or more correct than the charge of the learned Court below to the

Md.]

Opinion of the Court.

jury on all the legal aspects of the case." JUDGE McILVAINE, in the lower Court, in speaking of a spring which the plaintiff claimed was valuable to her property, said: "In 1889 this spring disappeared, and she alleges that the spring disappeared by reason of the subsidence of the surface, and the cracking of it, on account of the support being withdrawn by those that mined the coal, they having failed to leave sufficient coal to support the surface." He then went on to explain the duties and liabilities of the owner of the coal when the title to the surface is in another party, and he said he had the right to remove the coal, "and if, in so doing, he should interfere with the hidden streams of water that may be running through the earth, and thus drain the spring of another, he would not be liable for damages, if the spring failed simply because, in the ordinary operation of the mine, some subterranean stream was tapped, and by this means the water, in place of flowing to the opening in the ground where the spring was, flowed to some other place." He then went on to say however, that notwithstanding his right to remove the coal, he is required to leave enough to support the surface, or if he takes all of it out, he must substitute sufficient supports to keep the surface in place, and he added: "Now, if he fails to leave sufficient support, * * * and by reason of this failure to leave sufficient support the ground sinks, subsides and cracks, and that sinking and cracking divert a stream of water, then he would be liable, because that would be the direct result of his wrongfully withdrawing the support that is necessary and sufficient to sustain the surface." In *Rabe v. Shoenberger Coal Co.*, 213 Pa. 252, 62 Atl. 854, annotated in 5 *Am. & Eng. An. Cases*, 216, the plaintiff had a dairy farm which was usually well supplied with water. It had twelve springs on it, with water in every field. The plaintiff claimed that five of the springs were destroyed by the cracks in the land. The question was, "how much was the farm depreciated in value by the loss of the springs?" The controversy there was as to the measure of damages, but

the Court expressed no doubt about the right to recover for the loss of the springs destroyed by the cracks in the land. In *Weaver v. Berwind-White Coal Co.*, *supra*, the right of the plaintiff to recover for loss of springs, which resulted from the removal of the surface supports, was fully recognized.

So without further discussing that question we think there was no error in the rulings in the first and second bills of exception, or in rejecting the defendant's second prayer.

We do not find any error in rejecting the sixth prayer. In the first place, Mr. Brophy, the president of the appellant company, who is a skilled and intelligent mining engineer and familiar with the property, testified that he did not know whether the removal of the coal by the Davis Coal and Coke Co. had any effect on this property. The jury certainly could have done nothing but make a pure guess on that subject. But regardless of that, the prayer does not exclude the defendant's participation in the injury. If the tendency was, as the prayer proposed to submit to the jury, for the starta under the plaintiff's property, which dipped towards the land of the Davis Coal and Coke Co., on a grade of from ten to twenty feet in the hundred, to slip in that direction, there would seem to be all the more reason for the appellant to leave such support as was necessary to protect the surface of the plaintiff. It might be that with a surface of 350 or 400 feet, there would not ordinarily be so much damage by the excavation of six feet, but if that coal was so situated that upon the removal of the coal from the Davis Coal and Coke Company's property the ground would slide in that direction, the removal of the support in the Kearney property would probably be more disastrous than it would otherwise have been. So without further discussing that, we think the appellant got all it was entitled to by the granting of its third, fourth, fifth, eighth, tenth and eleventh prayers, and cannot complain of the rejection of its sixth, seventh and ninth prayers.

Md.]

Opinion of the Court.

Nor do we think that the appellant was injured by the use of the word "premises" in the plaintiff's prayers, instead of in terms reminding the jury that the defendant owned the mineral rights. We cannot assume that a jury engaged in hearing a case for three or four days would not better understand what they were trying—especially when other prayers, which were granted, explained it fully.

It must be admitted that the rulings on the questions presented by the third and fourth exceptions and the plaintiff's second prayer were not so free from doubt as the others, but when they are carefully considered, they do not seem to be subject to the objections that have been urged against them. The question in the third exception was, "What was the market value of that house of Mr. Kearney's before it was damaged by those breaks and falls?" Just before it was propounded to Mr. Duckworth, the witness, he had testified that, "I am familiar with market value of houses in that vicinity, and have worked as a carpenter occasionally and am generally familiar with prices paid for houses of that kind. Have been in Kearney house before damage was done, walls were broken, plastering cracked and house out of plumb." He said in answer to the above question, "Well, I suppose it was worth about \$1,000." The question in the fourth bill of exceptions was, "What was the value of the house at the time you examined it last fall by reason of the damage which was inflicted upon it by breaks and cracks in the walls?" To which he answered, "Well, I guess it would be about half the value. About \$500." It will be observed that the last question was as to the value of the house by reason of the damage which was inflicted upon it by breaks and cracks in the walls. It was in reality simply an effort to show the depreciation by reason of the injuries, and the prayer, which we will ask the reporter to publish, directed the attention of the jury to that particular question.

It was undoubtedly proper to show what the injuries to the house were. Its condition had been described by pre-

vious witnesses. One of them had said, "Since 1907 the Kearney house has been going down; the house is leaking, walls are cracked, base broken, foundations broken in several places, house two or three inches out of plumb?" A sister of the plaintiff who had lived with him said, "We are not living in the house now, because it is dangerous. When we first came here, me and my mother and father and three brothers lived here, and now there is only me and my mother and my brother living here until last November. My brother remains in the house still * * *. We left it because it was dangerous, but my brother stays there in one room in the back of the house. We stood it as long as we could. It has been getting worse ever since. In some places the cracks in the foundation were big enough for a wagon to pass through." That same witness testified, after speaking of the barn tipping over four or five inches, and also of another crack. "About a year afterwards the house began to crack. It has kept up more or less ever since. Just a week ago the ground opened just below the house—took several panels out of the fence." Mr. Brophy, the president of the defendant, said he had sent Mr. Fahey to the Kearney house and to the Wilson house (another one injured) and testified, "I instructed him to wedge them up, and keep them in plumb, so as to do as little damage as possible. We felt that we were probably responsible for the damages, and were willing to make it good, but we did not repair it. They would not accept any settlement for repairs." There was testimony that the land alone had decreased in value \$2,000 to \$2,100.

There was, therefore, ample evidence tending to show that the farm was seriously and permanently injured, and that the house was likewise not only seriously injured, but was, up to the time of the trial, continuing to crack and get worse. Under those circumstance it would seem strange if the law furnished no relief but repairing the house. There was apparently no attempt on the part of the defendant to show that it could be repaired. The statement of Mr.

Md.]

Opinion of the Court.

Brophy above referred to rather indicates that it could not be, beyond possibly checking the damage, although no question was raised as to whether that could be or ought to have been done. If it could have been repaired, unquestionably a house on a tract of fourteen acres, as fertile and productive as this was before the subsidence, would not be worth as much as it formerly was, when the tract was in such condition as the testimony shows this was in after the subsidence, and up to the trial was even getting worse. If the house had not been injured, it would not have been worth as much as it formerly was, when the land was cracking near it to the extent this was, the barn was injured, and the soil no longer fertile. Under all these circumstances there can be no doubt that the evidence showed that both the land and house were permanently injured, and it was practically impossible to restore the house to its former condition by repairs. Does the law then, under those circumstances, deny a recovery for the house for anything but the cost of repairs? Or, to state it another way, does the law require one whose house is thus injured, either to do a useless thing, or let the wrongdoer go unpunished? For, although those interested in the defendant doubtless greatly regret that the plaintiff was injured, and would not willingly have injured his property, the law treats the company as a wrongdoer, as it had no right to remove the supports.

We have no case in this State applicable to such conditions. It is true that in *Brown v. Werner*, 40 Md. 15, which was an action for negligently injuring the plaintiff's house by digging too near the wall, while deepening the cellar on the adjoining lot, it was said, "The action was for a *tort*, and the plaintiff was entitled to recover for all damages naturally or necessarily flowing from the wrongful acts of the defendants; and if his house was injured by the careless and negligent manner in which the appellants improved the adjoining house, he was entitled to recover such damages as would be sufficient to reinstate the wall and the house in

as good condition as they were prior to the injury.” And in *Con. Gas Co. v. Getty*, 96 Md. 691, which was a suit for damages to a house, caused by an explosion of gas, the same rule was stated. But in neither of those cases was there any difficulty in restoring the house to its former condition. When that can be done, and the injured house can be put in as good condition as it was before the injury, it is undoubtedly the safer and better rule of damages, but when the injury is of a permanent character, and repairing will not compensate the owner for the injury it would be a denial of justice to limit his recovery to something that would be of no practical use. As was said in the *Redemptorists v. Wenig*, 79 Md. 348: “The injury was, in the judgment of the witnesses, permanent, and thereby affecting the value of his land, and under such circumstances the jury had the right, in estimating the damages to take into consideration the loss suffered by the appellee in the depreciation in the value of his land.” In *Belt R. R. Co. v. Sattler*, 102 Md. 595, the distinction between permanent and temporary depreciation in the value of property is also recognized. So although, when repairs can restore the property to its former condition, that is the safe and proper measure of damages, yet if the testimony shows that cannot be done, and at the same time justice be done to the injured one it is proper to adopt another rule.

The distinction is well illustrated by the Pennsylvania cases in actions of this character. In *Noonan v. Pardee*, *supra*, the plaintiff had erected a dwelling house—the ground under it and in the neighborhood subsided, leaving a saucer-like depression about three feet deep in the middle, and extending over about two acres.” The Court said: “If plaintiff be entitled to recover, his measure of damages is the actual loss he has sustained to his land, including the building thereon, by reason of the cave-in. The difference in the market value before and after the injury in this class of cases is not the true rule. In this case, under the evi-

Md.]

Opinion of the Court.

dence, perhaps it worked no injustice; but in many cases it would do so."

But in *Rabe v. Shoenberger Coal Co.*, *supra*, the Court said: "It is sufficient to say that the sound rule is, that where there is a permanent injury to real estate, the extent of the damages caused thereby is to be measured by the resulting depreciation in the value of the property. Permanency of injury is the proper test for the application of this rule." It is true it is also said: "The principal injury of which complaint was made was the destruction of five springs of water. This injury was permanent and irremediable, as was also any damage to the surface which might render it less available for building purposes. Other injuries, such as the sinking of the dwelling house and the opening of cracks across the private right of way, were remediable. For the latter, the costs of repair or restoration is obviously the measure of the damage." But the Court pointed out the distinction and stated clearly that when the injury was permanent the depreciation of the market value was the measure of damages.

Then in *Weaver v. Berwind-White Coal Co.*, *supra*, it was said: "The rule is settled that the measure of damages for permanent and irremediable injuries to land caused by failure to give surface support is the actual loss in the depreciation of the value thereof. The permanence of the injury is the test for the application of the rule, *Noonan v. Pardee*, * * *. If the injury is reparable the cost of repairing may be recovered, and if the cost of repairing is greater than the diminution in the market value, the latter is the true measure of damages. In all such cases just compensation for the loss sustained by the trespass is what the injured party is entitled to recover. When the injury is permanent, the measure of damages is the difference in market value before and after the injury"—citing *Vanderslice v. Philadelphia*, 103 Pa. 102; *Fulmer v. Williams*, 122 Pa. 191; *Williams v. Fulmer*, 151 Pa. 405; *Thompson v. Traction Co.*, 181 Pa.

131. It then said: "In the case at bar the principal injury complained of was the destruction of the springs of water, although subsidence in the surface and disturbance of the buildings entered into the elements of damage claimed * * *. On the whole we think the testimony produced on the part of the plaintiff came fairly within this rule. It was directed to the point of showing the actual loss to the owners by reason of injury to the surface, loss of the springs, and damage to the buildings."

There is a note to *Rabe v. Shoenberger Coal Co.*, in 5 *A. & E. An. Cases*, 219, where many cases on both sides are collected, and that author says: "The prevailing rule in the United States for measuring the damage to real property for an injury to its lateral or subjacent support, and the rule which formerly obtained in England, appears to be, as announced in the reported case, the diminution in the market value of the property injured." In 18 *Am. & Eng. Ency. of Law*, 552, it is said: "It has been held that the rule as to the measure of damages where a building has been injured by the negligent removal of its lateral support is the same as where the recovery is for the removal of the support of the land in its natural state; that is, the measure of damages is the diminution in value of the property injured, and not the cost of repairing or restoring it." In 13 *Cyc.* 150, it is said: "As a general rule the measure of damages in actions for injuries to real property is the difference in value before and after the injury to the premises, although some of the Courts have considered the measure of damages as the difference in the rental value of the property injured * * *. In some cases the cost of repair or restoration has been adopted as the measure of damages; but in such event the cost of repair must be reasonable and bear some proportion to the injury sustained."

This opinion has already reached such length that we will not cite other cases (many of which can be found in the references we have given), or discuss the English cases, ex-

Md.]

Opinion of the Court.

cept briefly to refer to *Tunncliffe v. West Leigh Colliery Co.* (1906), 2 Ch. 22, and to that case in the House of Lords, where the parties names are reversed, (1908) A. C. 27. In the former the Court of Appeal held that in suits of this character, "the depreciation in the market value of the property attributable to the risk of future subsidence is a proper element of the damages recoverable." But in the latter, the House of Lords reversed the case, and adopted the contrary view and directed that the judgment of the lower Court be restored. In that judgment the learned Judge said: "Even after the expenditure of the amount allowed by the official referee for repairs, the appearance and condition of both mills will be very different from what they were before the subsidence." The House of Lords approved of the action of the lower Court, and in the opinion of LORD ASHBOURNE he said: "I am glad, however, to note that SWINFEN EADY, J., did not limit his judgment to the 1300£ for repairs, but has sanctioned a reference back to the official referee to 'assess the damages in respect of depreciation of the premises.' As the learned Judge says: 'A mill which has been much cracked and injured, and with walls bulging and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured. The repairs are very far from entirely reinstating it, and the loss to the plaintiffs is the same, whether the mill be sold and the loss realized, or whether the mill be retained by the plaintiffs, its value being reduced.'"

As will be seen by one of the cases cited above (*Weaver's case*), and there are many others to the same effect: "If the injury is repairable the cost of repairing may be recovered, and if the cost of repairing is greater than the diminution in the market value, the latter is the true measure of damages." So in a case where the cost of repairing exceeds or approaches (as indicated by the evidence) the diminution in the market value, it must be relevant to prove that value, for otherwise there would be no way of determining whether the cost of

repairing was greater than the diminution in value, and hence for that reason it was not error to allow it to be proved—indeed justice to the defendant might require it, under the above rule, if the cost of repairing exceeded it.

So under all the circumstances we are of the opinion that there was no reversible error in admitting the testimony embraced in the third and fourth bills of exception, and that the plaintiff's second prayer was sufficiently guarded to prevent doing the defendant injustice. As the testimony shows that the injury to the land is not only of a permanent character, but depreciates the value considerably more than one-half, which of itself must affect the value of the house, and as it also shows, with no evidence to the contrary, that the house was permanently injured, and was still continuing to develop such conditions as to make repairs of little, if of any, use, we are of the opinion that the difference between the market value of the premises (taken as a whole), before the injury and their present market value, in so far as the jury found it "has been reduced by injuries to the surface and to the improvements thereon," was the correct measure of damages. It follows that the judgment will be affirmed.

*Judgment affirmed, the appellant to pay
the costs, above and below.*

Md.]

Syllabus.

CATHERINE HANRAHAN vs. THE MAYOR AND
CITY COUNCIL OF BALTIMORE CITY ET AL.

Liability of Municipal Corporation and Its Contractor for Negligence in the Construction of a Sewer Trench Injuring Adjoining House—Right to Lateral Support—Evidence—Opinions of Experts—Pleading.

A count in a declaration against a municipality and its contractor for building a sewer which alleges that the defendant so located and constructed a sewer in the alley adjoining plaintiff's house that the earth supporting the walls of the house and its foundation settled and sank, whereby the house was injured, is bad on demurrer, since the defendants had the right to construct the sewer, and this count does not charge that they did the work improperly or negligently.

Plaintiff's house, which was new and well built, abutted on an alley in which the defendants, a municipal corporation and its contractor, constructed a sewer. The trench for the sewer some eight feet ten inches deep was dug on the side of the alley nearest to plaintiff's house and about six feet from the wall. This trench was allowed to remain open its full length for more than three weeks, during which time there were several severe rainstorms and the water was not pumped out of the trench, but was allowed to stand until it soaked into the ground. After the earth was thrown back into the trench, an inch and a-half water pipe, which crossed the trench three feet below the surface adjoining plaintiff's house, was broken. Such pipes should be supported when the trench is filled, but this pipe was not supported, and it was broken by the weight of the earth thrown on it. Sheet piling or lagging was used in the construction of the trench and was left in it when it was filled. The failure to cut off the lagging

below the surface allowed the water to run down behind it, making a cavity into which one witness, just before the trial, poured several buckets of water, which disappeared. After the construction of the sewer, the walls and ceilings of plaintiff's house began to crack and the cracks began to grow larger, and the rear wall fell out of plumb. *Held*, that this evidence is legally sufficient to show negligence on the part of the defendant in the construction of the sewer, resulting directly in injury to the plaintiff and that consequently it was error to instruct the jury that their verdict must be for the defendants.

A municipal corporation is not liable for any and all damage that may result to a property owner from the construction of a sewer, but it is liable for its negligent or unskillful performance of the work.

When a municipal corporation employs a contractor to build a sewer, under the supervision and control of a municipal official, the city is liable for any negligence of the contractor in the performance of the work.

The right of an owner of land to lateral support may be asserted against a municipality making excavations in the adjoining street.

The duty of the owner of a house to shore or prop his land after notice when excavations are made adjoining it, does not require him to guard against the negligence of the other party in making the excavations.

In an action where the question is whether the defendant was guilty of negligence in the construction of a trench and sewer, expert witnesses cannot be allowed to give their opinion that, from the facts stated in the questions to them, the defendants had not exercised due care. That was a matter for the determination of the jury.

In an action for injury to a house, evidence that certain repairs would put the house in as good a condition as it was before the injury is competent; as is also evidence concerning the effect on the value of the house of putting iron anchors or braces in it.

Md.]

Syllabus

When a certain document has been admitted in evidence, a party is entitled to read to the jury certain parts of it which he deems material.

In an action to recover damages caused to plaintiff's house by the construction of a trench and sewer alongside of it, a witness may be asked how long the trench remained open and why the sewer was constructed at that particular point.

When the record on appeal is so confused by a colloquy between the trial Court and counsel that this Court cannot determine the point to which an exception relates, it must be held that there was no reversible error in the ruling.

A witness qualified as an expert in digging sewer trenches may be asked what effect the standing of rain water in the trench would have on the lagging, and he may also be asked whether a certain sewer should have been built in sections or opened for its entire length.

When the question is whether a sewer was negligently constructed or not, a witness cannot give his opinion that it ought to have been made on the opposite side of the alley, for negligence in the location of the sewer is as much a question for the jury as whether there was negligence in the details of its construction.

When part of the negligence charged against the defendant is that a water pipe crossing a sewer trench was broken, a witness cannot be asked, "Do you know what causes a breakage in a case of that sort." The question is too broad and vague.

Nor can the witness be asked, "Is there any ordinary method commonly adopted to prevent this breakage, which by W.'s testimony was shown not to have been done." The first part of this question is proper, but there is no evidence to support the assumption in the latter part.

In an action charging the negligent construction of a sewer which injured plaintiff's house, a witness may be asked, "What would be the effect of water standing in a trench of eight feet depth upon the lagging, and also upon the foundation of the adjoining house."

Opinion of the Court.

[114]

A question is improper which assumes without proof that the defendant omitted to do something which ought to have been done.

In an action charging that defendants' negligence caused the injury complained of, the case should be submitted to the jury if the plaintiff's evidence be such that the fact of negligence can be fairly and rationally inferred from it. That evidence need not point unavoidably and unerringly to defendants' negligence.

Decided January 13th, 1911.

Appeal from the Baltimore City Court (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, THOMAS, PATTISON and CRNER, JJ.

William P. Lyons, for the appellant.

German H. H. Emory and *R. Howard Bland*, for the appellees.

PEARCE, J., delivered the opinion of the Court.

This action was brought by the appellant, Catherine Hanrahan, as owner of the house and lot No. 116 W. Lafayette avenue, Baltimore, to recover for damages to said house caused by the construction of a sewer by the appellee, the Mayor and City Council of Baltimore, acting in conjunction with the appellees, M. A. Talbott and Company, general contractors for said work under a written contract between them and the Mayor and City Council.

The declaration contains five counts.

The first count merely alleges that the defendants so located, dug and constructed a sewer in Rutler alley adjoining the plaintiff's property, that the earth supporting the walls of said house, and the foundation on which they were built set-

Md.]

Opinion of the Court.

tled and sank and said house was thereby injured without any negligence on her part directly contributing thereto. Both defendants demurred to this count, and the demurrer was sustained with leave to amend, but the plaintiff failed to amend. There was no averment in this count of any negligent act on the part of either defendant, nor of any actual physical invasion of the plaintiff's property, and in such case it is well settled in Maryland there can be no recovery under such a count. The Mayor and City Council is a municipal corporation authorized by the Act of 1904, Ch. 349, to build the sewer in question, either through its own servants or agents or through the agency of an independent contractor.

In *Offutt v. Montgomery County*, 94 Md. 115, the second count of the *narr.* alleged that the County Commissioners in changing the grade of a highway along the front of the plaintiff's property dug down seven feet beneath the level of said property, "whereby the lot is now rendered subject to inevitable caving and falling away." There was a demurrer to this count, and in sustaining the same the Court said: "It is not charged that the work was improperly or carelessly done, and inasmuch as the appellees had power to authorize the railway company to construct its tracks upon the bed of the street and to change the grade, and that the land of the appellant was not actually invaded, it follows that under the allegations of this count of the *narr.*, the appellant is not entitled to compensation for the injuries alleged to have resulted from the change of grade."

And in *De Lauder v. Balto. County*, 94 Md. 7, where under the peculiar facts of that case there was held to be an actual taking of the plaintiff's property, the Court said: "It is well settled in this State that as against a municipal corporation in the careful exercise of its right and power to grade or improve public streets or roads, and where there is no taking or actual physical invasion of property, there can

be no cause of action for an unavoidable injury done." Upon all the numerous cases which might be cited there can be no serious question that the demurrer to this count was properly sustained as to the city. The contractors in this case were performing this work under the supervision of the Mayor and City Council, and cannot be held under the allegations of this count to any other standard of liability. If authority were needed for this proposition, it may be found in *Balto. and Pot. R. R. v. Reany*, 42 Md. 130, in which JUDGE ALVEY, said: "As against the municipal government, in the careful exercise of its right and power to grade, change and improve the street, there could be no cause of action for any unavoidable injury done; but as against the appellants, *a private corporation in no wise connected with the municipal government* obtaining authority to use the streets in an extraordinary manner for its own private purposes and profit, the case is quite different." This language is so plain as to require no interpretation, and puts the contractors in this case in the precise position of the Mayor and City Council as respects liability to the plaintiff.

The fifth count charges that the Mayor and City Council in contracting with Talbott & Co. for the performance of this work assumed the duty to repair any damage or injury that might be done by the location or construction of said sewer and to protect from injury the plaintiff's property in the vicinity thereof by caving or otherwise, and that the contractors became jointly bound and liable to the same extent; but so located and dug said sewer that plaintiff's property was damaged by the settling of the walls of said house, and that defendants failed to protect the plaintiff's property as they were bound to do, and failed to restore said house to its condition before said injuries were received, or to pay the cost of such restoration, though requested so to do. Both defendants demurred to this count, which seems to have been drawn with reference to certain provisions of the contract

Md.]

Opinion of the Court.

between the Mayor and City Council, but the demurrer was overruled, and the general issue was pleaded to this count by both defendants. No notice was taken in argument, of this demurrer, and we shall therefore not advert to it further.

The second, third and fourth counts all allege negligence on the part of the defendants. The second charges negligence in the location and digging of the sewer trench. The third and fourth charge the same negligence and also charge that defendants negligently failed to use proper shoring or lagging in the construction of said trench, and negligently allowed the same to remain open an unreasonable time during heavy rains and thereby to accumulate water in said trench, undermining the walls of plaintiff's house; and the fourth, in addition to what is recited above, also charged that defendants negligently permitted and caused a water pipe of the Mayor and City Council which was exposed in digging said trench, to burst and flood said trench, and from thence to flow upon and against the plaintiff's wall, causing the same to settle and sink.

Twenty-seven exceptions were taken to rulings on evidence, and the twenty-eighth to the granting of the defendant's prayers offered at the close of the plaintiff's case.

These prayers were as follows:

"First.—The City prays the Court to instruct the jury that there is no evidence in this cause legally sufficient to entitle the plaintiff to recover under the pleadings against the City, and the verdict of the jury must therefore be for the City."

"Second.—The City prays the Court to instruct the jury that there is no evidence in this case legally sufficient to show any negligence on the part of the City, or for which the City is responsible, and therefore the plaintiff is not entitled to recover under the pleadings against the City, and the verdict of the jury must be for the City."

"First Prayer of the Contractors.—The defendant, M. A. Talbott Co., prays the Court to instruct the jury that under the pleadings of this case there is no evidence legally sufficient to entitle the plaintiff to recover, and the verdict of the jury must therefore be for the defendants, M. A. Talbott & Co."

In order that we may deal intelligently with the numerous exceptions relating to the exclusion of evidence we will briefly summarize the testimony which was admitted.

The undisputed evidence is that the plaintiff's house was built in the year 1900 by an experienced builder, for himself, out of the best material and with proper care and skill. and that until the construction of this sewer the walls and every part of the house were sound and in perfect condition. The plaintiff, who was then living in the house, testified that the trench for the sewer was open, altogether according to her recollection about six weeks; that there were many rainstorms during the time it was open, and water collected therein, which was not pumped, but was allowed to stand until it soaked in the ground; that after the trench was filled she heard the sound of water running, but could not tell where it was, and she called one of the men at work on the job, who discovered a broken water pipe of the city in the trench, which had been running for more than a day; that cracks in the walls and ceilings began to appear and have grown larger and more numerous, and the doors could not be locked or closed and she has been put to expense in endeavoring to close the cracks and repair the damage to the doors and to the house generally. Upon her cross-examination and from the testimony of other witnesses, it may be doubtful whether the trench was open so long as six weeks, but none of the testimony makes the time shorter than three weeks. Mr. Knight testified that he could not tell just how long a section he allowed to be open at one time, but could not recall that it was over 75 or 80 feet.

Md.]

Opinion of the Court.

Frank G. Walsh, a builder of twenty-one years' experience, corroborated the plaintiff as to the condition of the house in 1910, and said the wall at the rear corner was three and one-half inches out of plumb, and that the foundations of the house were three and one-half feet below the curb in the alley. He testified that he had dug many similar trenches alongside of buildings, and knew the custom of builders in digging such trenches.

John McKnight, a builder for thirty-five years in Baltimore City, who knew the house ever since it was built, saw the trench open in April, 1907, the pipes lying by it, and said this was the situation for several weeks; that about the fifth week, according to his recollection, the pipes were in the trench, and the dirt was thrown loosely in; that the trench was about eight feet deep, and the soil in the alley was good hard gravel and sand. He testified that he had built many sewers, both large and small, in Baltimore City.

Frank Ward, who was foreman of the Water Department in 1907, and also at the time of the trial, testified that on May 22nd, 1907, he repaired a broken inch and a half city supply pipe in this trench adjoining the plaintiff's house; that the sewer had been filled in fifty feet north from the broken pipe—up the alley; that water was running from this pipe in and outside of the trench; that the pipe broke in half from the weight of the dirt in the sewer trench; it was in good condition, not bent, but broken in half; he dug out the dirt three feet down, but could not tell how the pipe was kept in place; he said such accidents happened occasionally in sewer work, but could not say how often. The pipe was solid cast iron and crossed the trench at right angles three feet below the surface; it was old construction pipe, but the break would have occurred just the same if the construction had been new.

Herbert M. Knight, division engineer of the Sewerage Commission, testified that the sewer trench was on the west

side of the alley, two feet and eight and one-half inches from the west curb of the alley, and on plaintiff's side of the alley. That the pavement was not quite four feet wide, and the trench was eight feet ten and one-half inches deep. The contractors were under the supervision of the City, and he was in control of the work under the contract, but he did not know of his own knowledge what was under the bed of the alley on the side opposite the plaintiff's house; he knew from the records made and delivered to him as the work progressed by Inspector Braydon and Engineer Shriver that skeleton sheet piling or lagging was used in this trench, and it was left in the trench when it was filled; he was absent from the city from May 1st to May 21st, but was in Rutler alley May 22nd, when only the paving remained to be done, but saw no one working there.

John Carey, a builder, testified that he examined the plaintiff's house in 1907, and estimated what the necessary repairs would cost, and saw a man bailing water with a bucket out of this trench, which was filled with water.

John Trainor, who had an experience of thirty-odd years as a builder of sewers in Baltimore, and had made all sorts of excavations, said he had built sewers of various sizes from three or four feet in depth to twenty feet; that in this work he was accustomed to use lagging, and that he has seen rain-storms which flooded the trench and loosened the earth behind the lagging and the section would cave in, and that if water is allowed to get in a trench it will cut away the earth entirely. He testified that he examined the alley that morning; that the tops of the lagging ran along the curb, and in some places came up fair with the top of the pavement and a little higher; that the failure to cut off this lagging below the surface endangered the house; that he ran his whipstock down four and one-half feet below the curb next to the lagging, showing that the water strikes this lagging, runs down behind it and makes a cavity behind the lagging.

Md.]

Opinion of the Court.

He also said he had large experience with bursted water pipes in sewer trenches and that they should always be supported when the trench is filled in. He said the trench ought not to have been opened its full length, nor to remain open exposed to the weather, and that it should have been put on the other side of the alley.

Patrick Flannagan, a sewer builder for twenty-five years, testified that he examined this alley just before the trial; that some of the lagging was still visible above the surface, and there was a recess behind the lagging into which he poured several buckets of water, which disappeared as fast as it was poured in. He said the custom was to cut off the lagging below the surface.

The above is a substantial statement of all the testimony adduced in the case. Due care is a question for the jury to be determined upon the facts in evidence, and experts cannot be allowed to usurp the province of the Court and jury by drawing those conclusions of law or fact upon which the decision of the case depends. *Stumore v. Shaw*, 68 Md. 19. In the 1st, 4th, 5th, 6th, 13th, 15th, 16th and 25th exceptions, the witnesses Walsh, McKnight, Knight, Trainor and Flannagan were each asked whether, under the circumstances stated in the respective questions, due care was exercised by the defendants, and there was consequently no error in refusing to allow these questions to be answered.

In the second exception the witness Walsh was asked if the repairs which he had stated were necessary would have restored the house to as good condition as before the building of the sewer. We can see no objection to the question as bearing upon the amount of damage sustained, but as this witness had already said these repairs would put the house "in as good condition as possible under the circumstances," there was no injury resulting from the refusal to allow it to be answered.

In the third exception this witness was asked what effect on the value of a house there would be from putting in iron anchors or braces which he had mentioned in the necessary repairs. There is no apparent objection to this question, and we think it should have been allowed.

The seventh and eighth exceptions were taken to the refusal to allow the plaintiff's counsel to read to the jury paragraphs *a*, *b*, *c*, *d*, *e*, and *f* of the contract between the Mayor and City Council and the contractors. The whole contract had been previously offered generally and admitted in evidence without restriction as to any part, and under these circumstances we are not aware of any principle upon which the plaintiff could be precluded from calling the attention of the jury to such provisions as it deemed material to her interest. If any question was presented of the construction of those passages, the jury could have been instructed by the Court upon request of the defendant.

The ninth and tenth exceptions were taken to the action of the Court in allowing the witness Knight on cross-examination to be asked whether the trench was allowed to stand open one or two weeks or longer, and why the sewer was built on the west side of the center of the alley instead of on the east side. We think he was qualified to answer the first question after referring to the records regularly delivered to him in the daily course of business, refreshing his recollection as he thereby did; and we can perceive no reason why he should not be allowed to give his reasons for locating the sewer on the west side of the alley, in reply to plaintiff's contention that it should have been located on the east side.

The eleventh exception was taken to the granting of a motion to strike out an answer of Mr. Knight to a question of plaintiff's counsel. The record is so confused at that point by a colloquy between the Court and counsel that it is impossible to determine to what question the motion was directed. Before we can reverse a ruling in such a situa-

Md.]

Opinion of the Court.

tion we must be able to find some distinct and specific error, which we are unable to do in this instance.

In the twelfth exception the witness Trainor was asked, assuming the trench to be eight and one-half feet deep and four and one-half feet below the foundation of plaintiff's house on the west side of the alley, and that rain water was allowed to stand in the trench as testified to, what effect that would have had upon the lagging. The witness had qualified as an expert in digging sewer trenches and in the use of lagging in such work, and the question was a proper one for the information of the jury in reaching their conclusion as to the use of due care by the defendants.

For the same reason he should have been allowed to say whether in his judgment the sewer adjoining plaintiff's house should have been opened entire or built in sections. This bore not upon due care, but upon the approved method of building sewers, and there was evidence both that it was all open at once and that it was opened in sections. That conflict was for the jury, and it was for the jury to say under the circumstances of the case that either method was or was not consistent with due care. There was error, we think, in this ruling.

The seventeenth exception was taken to the refusal to allow the witness Trainor to answer what reason there was for not putting the sewer on the east side of the alley, and the eighteenth was to the question, "Ought not that sewer to have been built on the east side?" Both these questions asked for an opinion pure and simple, and the last emphasizes the vice by putting the question in a leading form. Whether there was negligence in the *location* of the sewer was as much a question for the jury to determine from such facts as to the location as were in evidence, as whether there was negligence in any detail of its construction, and neither was determinable by the mere opinion of a witness. There was no error in these rulings.

In the 19th exception the witness Trainor was asked in reference to the breaking of the water pipe, "Do you know what causes a breakage in a case of that sort?" the objection to which was sustained. This question was too broad and vague. He had heard Ward's testimony upon this subject, but he never saw the pipe and knew nothing of it. The twentieth exception is substantially the same question and is disposed of by what we have just said.

The twenty-first exception presents a very different question. That was, "Is there any usual and ordinary method commonly adopted to prevent this (breakage) which by Ward's testimony was shown not to have been done?" If the last clause of this question had been omitted it would have been material and proper, but the last clause assumed that Ward's testimony showed something had been left undone which should or might have been done, and there is no evidence to warrant this assumption. As framed there was no error in excluding this question.

The twenty-second exception is to a question asking Trainor if the usual precautions had been taken for protecting this pipe whether Ward would not have found some evidence of it. This was manifestly impossible for the witness to answer. In the twenty-third and twenty-fourth exceptions the witness Flanagan was asked what would be the effect of water standing in that trench of eight feet depth upon the lagging and also upon the foundations of the adjoining house. The answers to these questions coming from an expert would have stated facts directly aiding the jury in determining whether due care had been exercised by the defendants, and there was error in refusing to permit them to be answered. In 1 *Cyc.* 789, it is said the Court will take judicial notice of the probable consequences of an excavation, citing *Obert v. Denna*, 140 Mo. 476, where the earth fell in consequence of an excavation immediately adjoining and five feet below the foundation of a house. That of which the Court may take judicial notice may certainly be proved.

Md.]

Opinion of the Court.

In the twenty-sixth exception there was the same vice as in the twenty-first, the question assuming without proof that something was omitted which should have been done, and there was no error in the twenty-seventh exception, in which Flanagan was asked to give his opinion from Ward's testimony as to what caused the pipe to break.

We now come to the prayers.

In *Baltimore v. Schnitker*, 84 Md. 43, the Court said: "The principles upon which municipal corporations are held liable for damages occasioned by defects in streets, sewers and other public works are well settled by numerous cases in this Court and elsewhere. The defendant does not insure its citizens against damage from works of its construction, and is only liable as other proprietors for negligence or wilful misconduct."

In *Cahill v. Baltimore*, 93 Md. 288, JUDGE BOYD said: "Every owner of land within the bounds of a municipality may be required to suffer some injury in consequence of authorized improvements for the benefit of the public, for which he has no redress." But the learned Judge did not mean to include in those injuries such as are occasioned by the negligent commission or omission of municipal corporations in executing work they are authorized to perform, for in the same sentence he proceeds to say, "but to permit the same authorities to invade the property of such owner by making it the dumping ground for such articles as may be collected in the artificial drains constructed by them is as much an infringement on his rights as if they had taken possession of it for another purpose."

In *Baltimore and Pot. R. R. v. Reaney*, 42 Md. 130, JUDGE ALVEY said: "If a party acting under lawful authority inflict injury in the manner of executing authority, as by unskillfulness or negligence, he is liable for the consequences."

These cases will suffice to show that a municipal corporation has no greater immunity than a private corporation or person from the consequence of its own negligent or unskillful performance of lawful work.

Nor is there any difficulty in holding the City to be liable in this case for any negligence of the contractors in their performance of their contract, resulting in injury to the plaintiff; since the evidence is undisputed that the contractors were under the supervision of the City, and that the division sewer engineer was in control of the work. But even if Talbott & Co. were independent contractors the case would not be different. JUDGE SCHMUCKER, in *Bonaparte v. Wiseman*, 89 Md. 21, referring to *DeFord v. Keyser*, 30 Md. 179, declared "the distinction to be well established between the cases in which, when work is being done under a contract, an injury is caused by negligence in a matter collateral to the contract, and those in which the thing contracted to be done causes the mischief. In the former class of cases the employer is not liable for the injury, but in the latter he is."

We are not prepared to say there is any legally sufficient evidence in this case of negligence in the location of the sewer, but we are of opinion there was legally sufficient evidence tending to show negligence in the performance of the work resulting directly in injury to the plaintiff. There was evidence tending to show that the sewer was opened for its full length alongside of the plaintiff's house and was allowed to remain open during several severe rainstorms; that water was thus allowed to accumulate and stand in the trench for a considerable period in close proximity to plaintiff's wall; that the water pipe which burst in the trench after the trench was filled was unsupported in any manner, that being a matter within defendant's knowledge as to which it offered no evidence, and there being no evidence of any such support found in the trench when it was dug out to repair the pipe; also that the lagging used in the trench instead of being cut

Md.]

Opinion of the Court.

off below the surface, as there was evidence to show was the custom, was left protruding so as to form a channel for the water flowing from the sidewalk, and cause it to sink down along the lagging in proximity to the wall; and that the injury to the house was the natural consequence of the above manner of performing the work. We may properly observe here that in a city, the subsurface of whose streets is filled with water pipes, gas pipes, telephone and telegraph conduits and other agencies, it is of the utmost importance that in all excavations made in the streets due care should be taken to protect and safeguard those agencies so as to be as secure after as before such excavation, and that the life and property of abutting residents should be protected from injury that might result from such negligence.

In *Stearns v. Richmond*, 88 Va. 929 (29 Amer. St. Rep. 758), it was held that the right of an adjoining private owner to lateral support may be asserted as against a municipality making excavations in a street as well as against a private individual. The Court said: "A city having authority to grade its streets cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property, in a mode that would render a private individual responsible in damages, without being responsible itself." It was argued in behalf of the City here upon the authority of *Shafer v. Wilson*, 44 Md. 281, that it was the duty of Mrs. Hanrahan to shore or prop her house so as to render it secure in the meantime. But we think it is obvious that this is required not to guard against negligence of the other party in making the excavation, but to protect himself against an inevitable injury which might otherwise result from the most careful performance of the work. This is apparent from the following passage from *Shafer v. Wilson*: "The authorities are somewhat conflicting as to the extent of the right of the owner of any adjacent land built upon to improve his own property where he is under no dis-

ability (from grant of easement, prescriptive right or necessity) to restrict him, although it may operate to injure his neighbor's property. But it is agreed on all sides that his *right*, whatever that may be, *must* be exercised with due care and skill and, at his peril, to prevent injury to the adjacent owner."

And in *Serio v. Murphy*, 99 Md. 545, JUDGE FOWLER said: "If the owner of the building endangered by the proposed excavation has received proper notice, the party making the excavation is responsible only for actual or positive negligence in the manner of doing the work." So that whether the owner does or does not shore up his property, in either event if he is injured by the negligence of the other party he is not debarred from recovery.

It is true that the right of lateral support only extends to the soil in its natural condition, and does not protect buildings adding weight to the land, but the erection of buildings does not destroy the pre-existing right of support to the soil itself. In such cases there is no right of action for unavoidable injury not caused by negligence or unskillfulness, and which would not have occurred if there were no building on the land. But negligence resulting in injury gives a cause of action whether the land is built on or not.

We are not left to conjecture in this case the view held by the Court of the evidence of negligence to which we have referred, since in ruling upon the prayers the learned Judge delivered an oral opinion of some length incorporated in the record, in the course of which he said: " * * * There is no such exactness about the testimony in this case which, if the jury believed all the evidence that has been offered here on the part of the plaintiff, would point unavoidably and unerringly to a condition of affairs caused by the negligence of the construction of the sewer, and it is upon that ground, and upon that alone, that I will grant the defendant's pray-

Md.]

Opinion of the Court.

ers that there is no legally sufficient evidence in the case to entitle the plaintiff to recover."

We do not understand this to be the test of the legal sufficiency of evidence. In *Mallette v. British Assurance Co.*, 91 Md. 481, it was said, repeating the early rule: "The Court must assume the truth of all the evidence tending to sustain the claim, and all inferences of fact deducible from it."

In *Wetherall v. Clagett*, 28 Md. 465, the Court said: "Though the testimony be weak and inconclusive, yet if derived from a legal source and pertinent to the issue, the jury was the proper tribunal to pass on it." And in *McElderry v. Flanagan*, 1 H. & G. 308, the Court said: "If there be evidence from which a rational mind could infer a fact in issue, the County Court have invaded the province of the jury and their judgment must be reversed."

The view expressed by the learned Judge of the Baltimore City Court cannot be reconciled with those to which we have referred, and we are of opinion that it was error to withdraw the case from the jury.

We cannot regard this case as falling, as was argued, within *Harford County v. Wise*, 75 Md. 38, in which the affirmative evidence was equally balanced as to which of two causes produced the injury, for one of which the Court held the defendant was and for the other he was not responsible, and where it was held that neither cause could be said to be established by legitimate proof, the evidence in respect thereto being in a state of equipoise as to which caused the injury. This Court said the lower Court should have held there was in that condition of the proof no legally sufficient evidence of the cause for which defendant would have been liable if there had been such evidence. For the reasons stated the judgment must be reversed.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

THE BALTIMORE AND OHIO RAILROAD COMPANY *vs.* STATE, *USE OF* EMMA A. WELCH.

Negligence—Injury to Person on Private Right of Way of Railroad Company by Engine Running Backward—Knowledge of Perilous Situation of the Trespasser—Custom of Public to Cross Railway Track—Questions for the Jury—Evidence—Instructions—Discrediting Witness—Waiver of Prayer Withdrawal—Case from Jury by Offer of Evidence in Defense—Lookout on Tender of Engine Running Backward.

In an action to recover for injury inflicted upon a person who was at the time on the private right of way of the defendant railroad company, evidence is inadmissible to show that people generally were accustomed to cross the tracks of the defendant in that vicinity. The fact that the railroad company fails to prohibit the public from going on its tracks does not create a right in the public to do so, nor impose on the company an obligation to make special provision for the protection of such trespassers.

The provision of Baltimore City Code, Art. 30, sec. 14, requiring a lookout to be stationed on the rear of the tender of a locomotive going backwards within the city limits has been previously held to be obsolete; and therefore that municipal regulation is not admissible in evidence in an action to recover damages for a collision between the tender of a locomotive and a trespasser on the tracks.

Before a witness can be discredited by proof of former contradictory statements made by him, a foundation must have been laid by interrogating the witness as to the time, place and persons to whom the alleged contradictory statements were made, and the witness must have been asked whether

Md.]

Syllabus.

or not he had said or declared that which it is intended to prove.

When at the close of plaintiff's evidence the defendant offers prayers withdrawing the case from the jury, which are rejected by the Court, and the defendant elects to go on and offer testimony in defense, that testimony must be considered for the purpose of determining whether the plaintiff's evidence is legally sufficient to go to the jury.

Defendant company's engine and tender were running back slowly at the speed of about two miles an hour on defendant's private right of way. A city street ran to the tracks at that point, but did not extend across them. At a place on the tracks near that street, a boy, fourteen years old, was struck by the tender and killed. In an action for damages therefor, one of the plaintiff's witnesses testified that when the engine was a block and a-half away he saw that the boy's foot was caught and held between the switch point and the rail; that the boy was screaming and trying in vain to pull his foot loose, but was held fast until he was struck. Other witnesses for plaintiff did not see the boy until the engine was almost upon him. The defendant's witnesses, being the persons on the engine, testified that they looked back in the direction it was going and did not see the boy. *Held*, that if it be conceded that the boy was a trespasser on the track and the employees of the defendant in charge of the backing engine owed him no duty until they became aware of his presence on the track in a position of danger, yet the evidence is such that the case should have been submitted to the jury, since the plaintiff's evidence is legally sufficient to show that the defendant's agents were made aware of the boy's perilous situation in time to avoid the injury by the exercise of ordinary care.

Held, further, that a prayer offered by the defendant is erroneous which assumed that the duty of the defendant's servants to exercise care to avoid injury to the boy began only when they saw his danger. Under the plaintiff's evidence they could have been informed of his peril by his cries of distress before they saw him.

Held, further, that a prayer offered by the plaintiff is erroneous which instructs the jury that if they find that persons were accustomed to cross the tracks of the defendant at that point, it was the duty of the defendant's agents to keep a lookout for them and exercise special care for their protection. The duty of railroad agents to look out for and exercise care to avoid injury to persons at railway crossings and upon public highways, where such persons have a right to be and may be expected to be found, is different from the care required of them in regard to the presence of trespassers on railway tracks where they have no right to be and where they are not expected to be found.

Decided January 11th, 1911.

Appeal from the Superior Court of Baltimore City (SHARP, J.), where there was a judgment on verdict for the plaintiff for \$1,200.

Plaintiff's First Prayer.—That if the jury find from the evidence that on or about August 15th, 1909, the defendant owned and operated a railroad in Baltimore City on Wells street; that at the foot of Byrd street there is a space on each side of the tracks of said railroad which is used by pedestrians as a thoroughfare; that there are two main tracks, one for eastbound and one for westbound trains; that near the foot of Byrd street said eastbound track is, by means of a switch, connected with a sidetrack, as testified to and as shown by a plat offered in evidence; that the plaintiff's deceased, while in the act of crossing said tracks on Wells street, about or almost at the foot of Byrd street, had his foot caught in said switch, which was closed from the defendant's tower, holding him fast, and that while in this perilous position, one of the defendant's engines with tender ahead, moving backwards off the said siding, with no lookout on said tender, ran over him, resulting in his death within a few hours, and that

Md.]

Statement of the Case.

at the place where said boy was struck many people were at that time, and had been for several years prior thereto, accustomed to use said track as a footpath to and from points in the southern parts of the City of Baltimore, and that said track had been used in this way continually for many years, and that the defendant's servants and agents in charge of said engine could reasonably have expected to find persons on said track at that place on account of the frequent and continuous use thereof by footmen; and that there were no known or express rules or warnings against said use of said track at said place, and shall further find from all the evidence in the case that the defendant's servants or agents could, by the exercise of reasonable care and diligence, have seen said boy caught in said switch a reasonable distance ahead of said engine to have stopped same before said injury occurred, but the defendant's agents and servants in charge of said engine, through their carelessness and negligence, either failed to observe said boy in said perilous position, or to take such other action as a reasonably prudent man would have taken to avoid said accident; that said place of accident is in a well-populated section of the city; then the jury should find for the plaintiff, notwithstanding they may believe from the evidence that said boy had no legal right to cross said track, but was a trespasser in attempting to do so. (*Granted.*)

Defendant's Fourth Prayer.—That the defendant is not liable in this case, unless they find that the accident was entirely and directly caused by its negligence, and if they find that the deceased was in any manner guilty of negligence which in any way directly caused the accident, then their verdict must be for the defendant, unless they believe that the defendant's agents saw the deceased or by the exercise of reasonable care ought to have seen him in a position of peril in time to have avoided the accident by the exercise of due care. (*Granted as amended.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE PATTISON and CRNER, JJ.

Duncan K. Brent and Allen S. Bowie, for the appellant.

Linwood L. Clark, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appeal in this case is from a judgment of the Superior Court of Baltimore City against the appellant company for damages for fatally injuring the son of the equitable appellee by one of its locomotives.

It appears from the record that on the afternoon of Sunday, August 15th, 1909, James H. Welch, a minor son of the equitable appellee, about 14 years old, was run over and fatally injured by the tender of a locomotive of the appellant while it was backing along a switch on what is known as Wells street at or near the foot of Byrd street in Baltimore City. The entire bed of what is called Wells street was then owned by the appellant and occupied by its east and west bound main tracks and several switches. The boy was therefore at the time of his injury a trespasser upon the appellant's track unless he was present there by virtue of some implied license or permission from it.

The evidence both as to the details of the accident and the current uses of the locality of its occurrence are quite conflicting.

Wells street runs east and west. The territory lying north of it in the vicinity of the accident comprises part of the improved portion of the city, and contains many houses of the plainer sort such as are usually occupied by laboring people and factory operatives. The land lying south of the street at that point contains but few residences and is practically unimproved except by the appellant's roundhouse and coal chute and some factory buildings. Byrd street runs northerly from Wells street and at right angles to it, but

Md.]

Opinion of the Court.

does not intersect or cross it. South of Wells street, immediately opposite the foot of Byrd street, is situated the factory building of the National Enameling and Stamping Company, which ordinarily employs from 700 to 800 persons. The roundhouse, coal chute and yards of the railroad company lie a short distance east from the factory of the Enameling and Stamping Company.

The accident by which the appellee's son was injured occurred at a point almost opposite the foot of Byrd street on the track of a switch running along the bed of Wells street from the appellant's roundhouse to its main tracks and lying south of both of the main tracks. The witnesses for the defendant place this point further away from the line of Byrd street than those for the plaintiff. On the south of Wells street about two squares east from the foot of Byrd street there is a roundhouse of the appellant, and also a coal chute, from which the engine was backing along the switch toward the main track when it ran over the boy.

There is evidence in the record tending to prove that many of the operatives employed in the factory of the Enameling and Stamping Company and also other persons had for years past been in the habit when going to and from their work of crossing the defendant's tracks on Wells street in the vicinity of the factory without hindrance or opposition, and that there were no signs or warning near the place forbidding such crossing. This evidence does not tend to show the existence of fixed or definite places of crossing, but rather tends to establish a habit of crossing the tracks at will whenever persons wished to go over them.

There is also evidence in the record tending to show that the boy was on the track where he was injured from the time that the engine started from the coal chute, about a block and a half away, and that he was in full view from the engine while it was backing up to him. One witness testified that the boy was fastened to the track by having his

foot caught between the switch point and the rail when the switch was thrown, and was screaming and ineffectually struggling to free himself when he was run down by the tender of the backing engine. Other witnesses described the boy's action as the tender came upon him by saying that he "kind of raised off his feet" and "gave a sort of jump to get out the way of the engine," moving about six feet in the effort, or that he was walking on the track in front of the tender and started to run and fell. There is, on the contrary, evidence tending to show that it was impossible for the boy's foot to have been caught in the switch in the manner testified to by the witness who said that he saw him with his foot so caught.

There were three persons on the engine—the engineer and fireman, who were in charge of it, and a brakeman who was riding on it to his place of work at Camden Station. The brakeman testified that he was looking back over the tender all of the way up to the place of the accident, and did not see the boy until after he was injured. The engineer testified that he was on the left-hand side of the engine looking backwards in the way he was going until he got to switch No. 29, the place of the accident, and did not see the boy. The fireman testified that he was putting coal in the firebox and not looking at the track.

There was also evidence tending to show that the tender was one of the modern type, at the rear of which there was no provision for a person to stand as a lookout and that it would not be safe for anyone to stand there.

The case was tried before the Court and a jury, and the trial resulted in a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Twelve bills of exception appear in the record, of which eleven relate to rulings on the admissibility of evidence and one to the Court's action on the prayers.

The first three exceptions were taken to the admission by the Court, over the defendant's objection, of testimony tend-

Md.]

Opinion of the Court.

ing to show that persons had long been in the habit of walking along Wells street and crossing the defendant's tracks in the vicinity of the place of the accident. The Court below erred in admitting this testimony. The north and south streets in that section do not cross the property of the defendant which we have designated as Wells street, nor is there any evidence of the existence of any legalized public crossing of the railroad tracks at or near the place where the boy was run over. In *B. and O. R. R. v. Allison*, 62 Md. 487, we said: "A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and anyone who travels upon such right of way as a footway and not for any business with the railroad is a wrongdoer and a trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use it or create any obligation for especial protection. *R. R. Co. v. Godfrey*, 71 Ill. 500. Whenever persons undertake to use the railroad in such case as a footway they are supposed to do so with a full understanding of its dangers and as assuming the risk of all its perils." We cited many authorities for what was thus said and we have given expression to similar views in more recent cases. *Price v. P., W. and B. R. R. Co.*, 84 Md. 512; *Reidel v. P., W. and B. R. R. Co.*, 87 Md. 156; *Westn. Md. R. R. Co. v. State, use of Kehoe*, 83 Md. 434; *Ches. B. R. R. Co. v. Donahue*, 107 Md. 128. Those cases differ in principle from *McMahon's case*, 39 Md. 438, and *Sheridan's case*, 101 Md. 50, where the accident occurred to a person using a public street which was blocked by the cars which injured him.

The fourth exception was taken to the admission in evidence over the defendant's objection of section 14 of Art. 30 of the Baltimore City Code of 1906, requiring a locomotive when used within the city limits to have a man riding on its front when going forward and on its tender when going backward, not more than 12 inches from the bed of the road, &c., &c. That section has been held by us to be now practically

obsolete and inoperative in *B. and O. R. R. v. State, uses of Mali*, 66 Md. 59, and *State, use of Harvey, v. B. and O. R. R. Co.*, 69 Md. 346. We therefore think the ordinance in question should not have been admitted in evidence.

The fifth exception was to the refusal of the Court to grant the defendant's prayers to take the case from the jury, when offered at the close of the plaintiff's case. The defendant, under the settled law of this State, lost the benefit of that exception by introducing its evidence, but as the same prayers were again offered at the close of the whole case their propriety will be considered by us later on.

The sixth and seventh exceptions were taken to rulings similar to those presented by the first three exceptions, and are sufficiently disposed of by what we have said in that connection.

The eighth to the eleventh exceptions, which related to the effort of the plaintiff to contradict certain testimony for the defendant, were well taken because no sufficient foundation had been laid for the proposed contradiction. It is well settled that before a witness can be discredited by proof of former contradictory statements a foundation for such proof must have been laid by interrogating the witness as to the time, place and person to whom the alleged contradictory statements were made, and the witness must have been asked "whether or not he had said or declared that which is intended to be proved." *Higgins v. Carlton*, 28 Md. 115; *Brown v. State*, 72 Md. 475; *Peterson v. State*, 83 Md. 194. The questions which had been put to the defendant's witnesses touching the matters in respect to which it was proposed to contradict them were not such as the law requires.

At the close of the case the plaintiff offered two prayers, both of which the Court granted, and the defendant offered seven, all of which the Court rejected except the fourth, which it granted in a modified form.

We find no error in the rejection of the defendant's first, second and third prayers, when again offered at the close of

Md.]

Opinion of the Court.

the whole case, each of which sought to take the case from the jury. These prayers having been offered and rejected at the close of the plaintiff's case and the defendant having elected to go on and offer its testimony, that testimony must be considered by us for the purposes of the present inquiry in so far as it may be available to support the plaintiff's case. *Barabas v. Kabat*, 91 Md. 53; *Carroll v. Manganese Safe Co.*, 111 Md. 252. Conceding the defendant's contention that the plaintiff's deceased must be regarded as having been on its track as a trespasser when he was injured, and that therefore under our rulings in *Kehoe's case*, 83 Md. 434; *Millslagle's case*, 73 Md. 74; *Price's case*, 84 Md. 506, and *Donahue's case*, 107 Md. 119, its employees in charge of the backing engine owed him no duty until they became aware of his presence on the track in a position of peril, we still think there was evidence in the case requiring the Court to send it to the jury.

The plaintiff's witness Trump, whose testimony for the purpose of the present inquiry must be taken to be true, testified that the boy's foot was caught between the switch point and the rail when the engine was a block and a half away from him, and that he screamed and yelled and tried in vain to pull his foot loose, but he was held fast until the tender ran over him. As the engine and tender approached him they moved at the rate of but two miles an hour. Both the engineer and the brakeman who were then on the engine testified that they were looking back in the direction in which they were moving, all of the time, and did not see the boy toward whom they were going until after the tender had passed over him. If those two witnesses told the truth, Trump could not have done so; but their evidence was not conclusive of the fact and the jury may not have believed them. The onus was undoubtedly upon the plaintiff in order to support her case to produce evidence sufficient to satisfy a reasonable jury that the defendant's agents were made

aware of the presence of the boy ahead of them in a position of peril in time to have avoided injuring him, but she was not bound to establish the fact of the agents' knowledge of the boy's peril by their own admission. She might prove it over their denial if she could satisfy the jury of the fact by competent evidence. Evidence that a person was present and looking at an object would ordinarily be regarded as affording strong *prima facie* proof that he saw it.

None of the eyewitnesses of the accident other than Trump saw the boy before the engine was almost upon him, and their accounts of what happened when they did see him are neither clear nor uniform. The jury, to whom the case was sent by the learned Judge below, were the proper parties to estimate and pass upon the credibility of the conflicting witnesses as to what occurred while the engine was backing from the coal chute up to the place of the accident, as well as the weight of the whole testimony.

In *Consolidated Ry. Co. v. Armstrong*, 92 Md. 554, and many other cases there cited, where there was testimony tending to show that the defendant or its agents had an opportunity to discover a plaintiff's peril, by the exercise of reasonable care, in time to avert it, it was held that the jury should be instructed that the failure to exercise that care made the defendant liable for an injury resulting from such failure, even though the plaintiff's deceased had gotten into the situation of peril through his own negligence. But in *Armstrong's case* and most of the cases there cited the injured person was not a trespasser, but at the time of his injury was in a place where he had a right to be, such as a public street either where it crossed a railroad or where its bed was occupied by the tracks of the street railway.

The cases last referred to, when considered together with *Kehoe's case*, 83 Md. 434, and the line of cases hereinbefore referred to in connection with it, plainly show that the duty of those in charge of moving railway trains to keep a lookout for and exert care to avoid injuring persons at railway

Md.]

Opinion of the Court.

crossings and on public highways where such persons have a right to be and may be expected to be found, is entirely different from the care required of them in respect to the possible presence of trespassers on the railway tracks where, having no right to be, they are not expected to be found. We have repeatedly held in the cases already referred to and others, that those in charge of the trains have no duty to anticipate that persons will unlawfully go upon the tracks, and consequently the failure to guard in advance against the possible or probable results of such unexpected wrongful presence of persons on the tracks does not constitute negligence on the part of the railroad company, whose liability to use care to avoid injuring any person so trespassing on its property begins only when their agents are made aware of his presence and peril.

The defendant's fourth prayer in the form in which it was offered, and its sixth and seventh prayers were defective in holding that the duty of the defendant's agents to exercise care to protect the plaintiff's deceased would begin only when they *saw* him in a situation of peril instead of when they became aware of his peril. If Trump's testimony that the boy was screaming and yelling from the time his foot was caught in the switch was true, those in charge of the engine might have been informed of his peril by hearing his cries of distress. The seventh prayer also is predicated in part upon the assumption that those in charge of the engine did not keep a lookout as it backed along the switch. The engineer and brakeman testified that they kept a constant lookout ahead in the direction in which the engine was going.

The plaintiff's first prayer which defines her right of recovery erroneously assumed that the evidence, if the jury believed it, touching the habit of persons to cross the tracks at and near the location of the accident by which the boy was injured, imposed upon the agents of the defendant the duty of expecting the presence of persons on the tracks at that place and the corresponding obligation of keeping a lookout

for them and exercising especial care for their protection. That proposition is in conflict with the repeated decisions of this Court in respect to the duty and responsibility of a railroad company to unauthorized persons who go upon its right of way. *Price v. P., W. and B. Ry. Co., supra; B. and O. Ry. Co. v. Allison, supra; Westn. Md. Ry. v. State, use of Kehoe, supra; Ches. Beach. Ry. Co. v. Donahue, supra.*

The plaintiff's second prayer, stating the law as to the measure of damages, was in the usual form and free from objection.

For the error in granting the plaintiff's first prayer and in the rulings on evidence mentioned in this opinion, the judgment appealed from must be reversed and the case remanded for a new trial.

Judgment reversed, with costs, and case remanded for a new trial.

NORA E. HUFF, ADMINISTRATRIX, vs. HARRY M. SIMMERS.

Action by Son to Recover for Services Rendered to His Mother in Carrying on a Business—Sufficiency of Evidence of Agreement to Pay—Instructions—Evidence of Payment—Admissions Against Interest—Voluntary Payment of Another's Debt.

In an action by a son against the administrator of his mother's estate to recover for services rendered to her in her lifetime in carrying on a bakery business, the evidence examined held to be sufficient to show a promise on the part of the mother to pay for the services and their rendition by the plaintiff.

Md.]

Syllabus.

In such action, evidence is admissible to show that the plaintiff had presented a claim against his father's estate, and had said at the death of his mother that he had no claim against her estate.

Evidence is also admissible to show that the plaintiff's mother had paid to him certain sums of money in her lifetime, in connection with other evidence tending to show the relation between the parties, and that this payment would ordinarily be made in compensation for services performed.

In an action to recover for services rendered to a decedent, a prayer offered by the plaintiff told the jury that if they found that the decedent promised to pay the plaintiff thirty dollars per month for the work performed by him, or promised to pay him for the work, and shall also find that thirty dollars per month was a reasonable and just compensation for the work performed, then their verdict may be for the plaintiff for such sum as the jury may find to be due for the work. *Held*, that this prayer does not contain conflicting propositions, since the plaintiff would be entitled to recover upon either alternative, according as the jury found that the one or the other was supported by the evidence.

Held, further, that this prayer is not in conflict with a prayer granted at the instance of the defendant which instructed the jury that if the decedent did not have a license during the period in which the services sued for were rendered, they might consider that fact in determining the question whether the business in which the services were alleged to have been rendered was conducted by her.

When a party promises to pay for work to be done for another, that constitutes an original undertaking and is not a promise to pay another person's debt.

A person is not entitled to recover money paid for another's benefit unless paid at the request of the latter.

Decided January 11th, 1911.

Appeal from the Circuit Court for Washington County (KEEDY, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Levin Stonebraker and Harvey R. Spessard, for the appellant.

Jos. W. Wolfinger (with whom was *Elias B. Hartle* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellee recovered a judgment against the appellant in the Circuit Court for Washington County, and this is the defendant's appeal. It involves the correctness of three rulings made by the lower Court during the progress of the trial upon questions of evidence and instructions to the jury granted at the close of the whole case. As the case must be remanded for a new trial, we will refrain from commenting upon the evidence, except so far as it may be necessary to make clear the reasons upon which our decision rests.

The suit is in assumpsit against the administrator *c. t. a.* of Flora B. Simmers, deceased, who was the mother of the plaintiff. The declaration contained the common counts and one special count, which alleged that Flora B. Simmers on or about the first day of January, 1907, agreed with and promised the plaintiff that if he would conduct and manage the bakery owned and controlled by her she would pay the plaintiff for his services; that he did conduct and manage said bakery until or about January 1st, 1909; but had not been paid for his services thus rendered. The plaintiff filed the following bill of particulars:

Md.]

Opinion of the Court.

"HAGERSTOWN, MD., March 2nd, 1910.

*The Estate of Flora B. Simmers,**To Harry M. Simmers,*

Dr.

To amount paid Dr. A. A. Lamar for medicine and medical service to Flora B. Simmers, during her lifetime.....	\$ 20.00
To amount paid George B. Oswald, for interest on mortgage against Metz Property for Flora B. Simmers, during her lifetime.....	180.00
To amount paid D. W. Reichard, Collector of State and County Taxes, for 1908 for Flora B. Simmers, during her lifetime.....	14.47
To services rendered Flora B. Simmers, during her lifetime, in conducting and managing the bakery of the said Flora B. Simmers from the first day of January, 1907, to the first day of January, 1909 (24 months), at \$30.00 per month.....	720.00
To amount paid L. J. Orrick on account of Flora B. Simmers, during her lifetime.....	99.76

\$1,034.23."

The defendant pleaded the general issue pleas, upon which issue was joined. No evidence was offered to support the second and third items of the bill of particulars, and by the defendant's third prayer, which was conceded, the jury was instructed that no recovery could be had for either of these charges. The evidence shows that Thomas Simmers, the father of the plaintiff, died on or about the 1st of December, 1907. At the time of his death and for a number of years prior thereto he was conducting a bakery and small confectionery store at Smithsburg in Washington County. A trader's license for the conduct of this business had been issued to him for the six years immediately preceding his death; the one issued to him in 1907 expired on May 1st, 1908. There was evidence to the effect that the fixtures and stock in trade

in this store and bakery had been supplied by Mrs. Caroline Norford, and at the death of Flora B. Simmers, her daughter, they belonged to her. Mrs. Norford testified that at the death of her daughter, Mrs. Simmers, the counters, shelving, appliances and stock in trade belonged to her; that she had started the store many years ago. Declarations of Flora B. Simmers were put in evidence to the effect that the fixtures had been put in by her mother, and that she was to have the use of them as long as she wanted, and that "if she happened to die before her mother they were to be her mother's, and that her mother furnished the money to finish paying for the stock she bought."

No administration was had upon the estate of Thomas Simmers, and for the year 1908 (the year succeeding his death) the license for the conduct of the business was issued to the plaintiff. Mrs. Simmers died in December, 1908, leaving a last will and testament in which the plaintiff was appointed executor, and in the inventory of her personal estate no return or mention was made of the chattels or stock in trade of the bakery or store. The plaintiff was removed by the Orphans' Court of Washington County as executor, and the appellant was appointed administrator *c. t. a.* of the estate of Mrs. Simmers. It appears that during the latter part of the year 1907 Thomas Simmers was in feeble health and not able to attend to business, and there is evidence on behalf of the plaintiff that after the death of Thomas Simmers, Mrs. Flora B. Simmers conducted the bakery and store until her death in December, 1908, although the license was issued to the plaintiff. The plaintiff produced a number of witnesses, who testified that during the years 1907 and 1908 the plaintiff did general work in connection with the bakery and store; that he cut the wood for the oven, did the baking and attended to the business. Mrs. Virginia Simmers, wife of the plaintiff, testified that the plaintiff did the work in connection with the store and bakery; that she heard Mrs.

Md.]

Opinion of the Court.

Simmers ask her husband to do the work and attend to everything; that his father was not able to do anything, and that she would pay him. This, the witness said, was in June, 1907, and that "right after" the death of his father Mrs. Simmers told the plaintiff that if he would stay there and work for her she would pay him thirty dollars per month; that her husband did the work until the business was closed in April, 1910.

Mrs. Norford and James Butts testified that after the death of Thomas Simmers they heard Mrs. Simmers say that she would pay the plaintiff thirty dollars per month for his work. J. L. Orrick, a baker, testified that the work done by the plaintiff was worth eight dollars per week.

This evidence, if believed by the jury, would have entitled the plaintiff to a verdict for the services rendered in pursuance of his mother's promise. Under the pleadings it was competent for the defendant to show either that Mrs. Simmers was never indebted to the plaintiff, or that any indebtedness which may have existed had been wholly or partly paid. Any facts and circumstances from which it might be reasonably inferred that she never owed the plaintiff or that her indebtedness to him, if any existed, had been paid were admissible.

The defendant offered to prove by Mrs. Clarine Norford that on or about February or March, after the death of Mrs. Simmers, the plaintiff "presented a paper to her which he then and there explained was a claim for twenty-five hundred dollars, which he desired to bring against the estate of his mother, Flora B. Simmers, for working and baking for his *father* for fifteen years," and offered to follow this up "by proving by Thomas E. Hilliard, Register of Wills, that in conversation that he had with Mr. Simmers, the plaintiff, in connection with this said alleged claim of twenty-five hundred dollars, that he then and there told the said Harry M. Simmers that it was the custom of the Court, meaning thereby

the Orphans' Court, where an executor presented a bill or claim, to ask him to get the endorsement of the heirs."

The refusal of the Court to permit this evidence to be introduced constitutes the first exception. There is evidence in the record that the plaintiff testified before the Orphans' Court in the proceedings had therein to remove him as executor that "he had no claim at all against his mother's estate." The proffered testimony should have been admitted, as it reflected upon the *bona fides* of the claim made in this suit. It is said in *Brook v. Winters*, 39 Md. 505, that "the rule that excludes facts because they are collateral does not apply to facts wherever existing, if they may afford any reasonable presumption as to the matter in dispute. Whether they are facts, before or after the suit, they are admissible if they may illustrate or explain the question in issue."

Counsel for the appellee contended that the evidence was properly excluded because it offends against the rule which forbids offers of compromises to be admitted in evidence. But we do not regard the interview between the plaintiff and Mrs. Norford or the statements made by the plaintiff to her as being within the rule. The sole object which the plaintiff had in mind in approaching the witness was to secure her endorsement of the claim preparatory to its presentation to the Orphans' Court, as he was advised it was customary to do where the executor presented a claim. The facts do not bring the statements within the rule stated in the case of *Reynolds v. Manning*, 15 Md. 526; *Biggs v. Langhammer*, 103 Md. 102; *Acker, Merrill & Co. v. McGaw*, 106 Md. 560, and other cases relating to the inadmissibility of offers to compromise.

The defendant offered to prove by Walter Brenner, the cashier of the Smithsburg Bank, that during the period covered by the bill of particulars the plaintiff had received the proceeds of two checks, aggregating the sum of five hundred and twenty-five dollars, drawn by Flora B. Simmers on the

Md.] ,

Opinion of the Court.

Smithsburg Bank to the order of the plaintiff; that the plaintiff received in cash from the bank three hundred and fifty dollars, the amount of two of these checks, and that the amount of one check, to wit, one hundred and seventy-five dollars, was deposited to his credit. The Court refused to permit the introduction of this testimony, and this ruling constitutes the second exception.

It is settled in this State that under the general issue in *assumpsit* the defendant may offer evidence of payment. 1 *Poe on Pleading*, secs. 607-609; *Seff v. Brotman*, 108 Md. 278, and cases therein cited.

It is not claimed that the mother of the plaintiff was ever indebted to him in any way other than as stated in the bill of particulars. The plaintiff was a married man and lived in the same house in which the store and bakery were located. The work he did was principally that of a baker, and the evidence is such that it might be reasonably inferred that he was dependent upon his weekly wages for the support of himself and family. His account allows his mother no credit whatever, and yet during the period he claims to have worked for her he received from her the sums mentioned. In the absence of some explanation, the jury might have well concluded that this money or some part of it was paid for the services sued for. The receipt of the money in connection with the relation of the parties and the financial condition of the plaintiff should have been admitted in evidence.

It has been held that the fact that the plaintiff during the period when he might have enforced his claim by suit, if he had one, was in indigent circumstances and needed the use of the money, is a circumstance tending to justify the presumption that the demand has been paid or otherwise satisfied.

In addition to this circumstance, affording a presumption of payment under the facts in this case, we have the further fact of the actual payment by his mother of substantial sums

of money during the identical period embraced in the bill of particulars.

There was no error in the ruling on the third exception whereby the plaintiff was permitted to say why the license for the year 1908 was taken out in his name. His answer to the excepted question in no way injured the defendant.

This brings us to the rulings on the prayers. The Court granted the plaintiff's first prayer and the defendant's fifth and eighth prayers. The defendant's second, third and fourth prayers were conceded, and his first, sixth, seventh, ninth, tenth and eleventh were refused. The granted and conceded prayers put the case, so far as it related to the recovery for the services sued for, as fairly and as favorably to the jury as the defendant had a right to expect.

The plaintiff's first prayer told the jury that if they believed from the evidence that the defendant's decedent, Flora B. Simmers, promised to pay the plaintiff thirty dollars per month for the work performed by him as testified to and sued for in this case, or promised to pay him for the work performed by him, as testified to and sued for in this case, and shall further find that thirty dollars per month was a reasonable and just compensation for the work thus performed, and shall further find that the plaintiff performed the work as testified to, then their verdict must be for the plaintiff for such sum as the jury may find to be due for the work thus performed. We see no good objection to this prayer. Its postulate in either alternative in which it allowed a recovery was the express promise to pay for the work done by the plaintiff, the amount of the recovery in either event being limited by the prayer to "such sum as the jury may find to be due for the work thus performed."

The appellant contended that the prayer contained conflicting propositions of law, and the case of *Western Maryland Railroad Company v. Kehoe*, 83 Md. 551, is relied upon to support this contention. We see no reason for reviewing

Md.]

Opinion of the Court.

that case, which in its facts was wholly dissimilar to this, as we do not understand that that decision supports the appellant's position. The Court there held that there was no evidence to support the first alternative of the plaintiff's fourth prayer, and that the failure of the defendant to discover the perilous situation of the plaintiff under the circumstances did not constitute negligence on the part of the defendant. In this case the plaintiff would have been entitled to recover upon either alternative, if the jury found that one or the other was supported by the evidence. The prayer does not contain conflicting propositions, as the one in *Kehoe's case* did, but merely asserts alternative propositions upon either of which he might have recovered. Nor is the prayer in conflict with the defendant's fifth prayer, which was granted. That prayer told the jury that if they found that Flora B. Simmers did not have a license during the period in which the services sued for were rendered, they might consider that fact in determining the question as to whether said business was being conducted by her. The mere fact that she did not conduct the business would not of itself preclude a recovery. The defendant's sixth, seventh, ninth, tenth and eleventh prayers were properly rejected for obvious reasons. As applied to the facts in the case they were unsound and misleading. The sixth prayer asserted that the plaintiff was estopped from claiming or contending that Flora B. Simmers was the owner of the business, if they found that he did not include in the inventory the chattels, &c., in the store and bakery at the time of her death. The evidence which we have quoted explains why they were omitted, and tends to show that they did not belong to the deceased. The seventh prayer asserted that there was no legally sufficient evidence in the case to prove that there was a design on the part of the plaintiff at the time of the rendition of the services to charge and an expectation on the part of Flora B. Simmers to pay for the services. The evidence that there was an express

promise by Mrs. Simmers to pay for these services was sufficient to cause the refusal of this prayer. By his ninth prayer the defendant asked the Court to instruct the jury that if they found that Thomas Simmers was the owner in his lifetime of the bakery and store referred to in the evidence, and should further find that he died on or about the 2nd of December, 1907, "then the jury are instructed that the plaintiff is not entitled to recover for any services rendered in connection with the management and conduct of said store and bakery prior to the 2nd day of December, 1907, unless the jury shall further find that the said Flora B. Simmers, deceased, promised in writing to pay for said services, and the jury are further instructed that there is no legally sufficient evidence in this case to prove that the said Flora B. Simmers, deceased, promised in writing to pay for said services." Mrs. Virginia Simmers testified that Flora B. Simmers in June, 1907, promised to pay for the work done by the plaintiff. This, if true, constituted an original undertaking on her part, and because of this testimony the prayer could not have been granted. The eleventh prayer asserted that under the pleadings there was no legally sufficient evidence to entitle the plaintiff to recover under the special contract for services. This prayer was properly refused in view of the evidence we have referred to tending to prove a special contract made by Mrs. Simmers with the plaintiff.

The defendant's first prayer should have been granted. The Court was asked by this prayer to instruct the jury that there was no legally sufficient evidence in the case to entitle the plaintiff to recover for any money paid by the plaintiff for or on behalf of Mrs. Simmers. In the bill of particulars there is a charge of twenty dollars paid to Dr. A. A. Lamar for medicine and medical services rendered to Mrs. Simmers during her lifetime. This amount was sought to be recovered under the fifth count of the declaration as money paid by the plaintiff for the deceased in her lifetime at her request. To sustain a recovery under this count it must be alleged and

Md.]

Syllabus.

proved that the money was paid upon the request, express or implied, of Mrs. Simmers. The only evidence in the record relating to this claim is that of Mrs. Virginia Simmers to the effect that the plaintiff got medicine from Doctor Lamar for his mother, and she *thought* she "saw about five dollars paid."

In 1 *Poe on Pleading*, sec. 107, it is said that it is not sufficient to prove the defendant's liability to a third person, and that the plaintiff discharged that liability, for the payment may have been gratuitous or officious; and the mere fact that the defendant derived an advantage from it will not authorize a recovery. If the rejection of this prayer were the only erroneous rulings in the case we would not be disposed to disturb the judgment, as the injury thereby resulting to the plaintiff was slight; but there was serious error committed in the ruling on the first and second exceptions, and the judgment must therefore be reversed and a new trial awarded.

*Judgment reversed and new trial awarded,
the appellee to pay the costs.*

CHARLES T. LEVINESS, JR., ET AL. vs. CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY ET AL.

Jurisdiction of Court of Equity to Decree Release of Lien on Preferred Stock—Representation in Equity of Parties Having a Common Interest—Vendor and Purchaser—Costs—Adjustment of Interest and Taxes.

The mere circumstance that the instrument creating a lien on corporate property makes no provision for releasing it does not prevent a Court of Equity from releasing it when

it is shown to be to the advantage of the parties concerned and when precautions are taken to safeguard their rights.

To the general rule that all persons interested must be made parties to a proceeding in equity by which their rights may be affected, there is an exception in the case when the parties interested in certain property are numerous, and it is impossible to bring them all before the Court. In such case, if a sufficient number of the persons interested are brought into Court, so as to be fairly representative of the large class having common interest, the decree made will bind all of them.

Code, Art. 23, sec. 408, formerly provided that corporations having power to issue bonds secured by a mortgage should have the power to issue preferred stock, which should constitute a lien on the franchises and property of the corporation, and have priority over any subsequently created mortgage or other encumbrance. No provision was made in the statute for the release of the lien of the stock on the property of the corporation. After a corporation had issued several thousand shares of preferred stock, which were held by several hundred persons, it contracted to sell a lot of ground which it owned at the time of the issue of the stock, and which was subject to the statutory lien. The purchaser objected to the title. Upon a bill for specific performance against him and some of the preferred stockholders, to which bill the trustee under a prior mortgage of the property of the corporation was a co-plaintiff, *held*, that the lien of the preferred stockholders may be discharged as to any particular part of the corporate property under a decree of a Court of Equity passed in a proceeding in which fairly selected representatives of that class are made parties, and in which the reasonable necessity for a sale is alleged and proved after suitable provision is made for the protection of the lienors with reference to the appropriation of the proceeds.

When a suit in equity and a decree is necessary to make good the title to property sold by a corporation in order to discharge the lien on it of preferred stock, and the corporation files a bill for specific performance of the contract to buy it,

Md.]

Opinion of the Court.

the purchaser should not be subjected to the costs of the case below or on appeal, and interest on the purchase money and taxes on the property should be adjusted as of the date of the decree in this Court.

Decided January 13th, 1911.

Appeal from the Circuit Court No. 2 of Baltimore City (STOCKBRIDGE, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, PATTISON and URNER, JJ.

Joseph C. France and *Edward M. Hammond*, for the appellants.

W. Calvin Chesnut (with whom were *Gans & Haman* on the brief), for the appellees.

URNER, J., delivered the opinion of the Court.

In this case the inquiry is whether property belonging to a corporation and subject to a statutory preferred stock lien can be released from that encumbrance for the purposes of sale and reinvestment, and if so, what is the proper procedure to accomplish such a result.

The suit was brought by the appellee, the Consolidated Gas Electric Light and Power Company of Baltimore for the specific performance of a contract for the sale to the appellants for \$50,000 of an unimproved lot of ground upon which the principal office of the company was formerly located. This lot, with the other corporate property, was subject to the prior lien of a mortgage securing a large issue of bonds, and also to the lien of the preferred stock of the company created under section 408 of Article 23 of the Code of Public General Laws. The mortgage contains a clause enabling the company, with the consent of the trustee for the bond-

holders, to sell any part of the mortgaged property clear of the mortgage lien, the purchase money, however, to be paid to the trustee and to be held or reinvested as particularly provided. Such consent has been duly obtained for the sale in question. There is no provision for the release of the lien of the preferred stock either in the statute authorizing or the instrument directing its issue. The appellants, as purchasers of the lot mentioned, while desirous to consummate the transaction, object to the title on the ground that it may not be susceptible of conveyance to them discharged of the lien of the preferred stock.

The vendor company was formed by the consolidation of two previously existing corporations. In the certificate of consolidation provision was made for the issuance of preferred stock in two classes, the first, amounting to \$700,000.00, to be known as "Prior Lien Preferred Stock," and the second, amounting to \$11,616,774.00, to be known as "Preferred Stock." To the preferred stock of each class a perpetual annual dividend of six per centum was guaranteed "out of the profits of the company." It was provided that the holders of preferred stock of both classes should have "all the incidents, rights, privileges, immunities and liabilities to which the capital stock of said corporation, or the holders thereof, may be entitled or subject," and that this stock "shall be and constitute a lien on the franchises and property of said corporation, and shall have priority over any subsequently created mortgage or other encumbrance"; but it was made "subject and subordinate" to any mortgages or other liens already existing upon the properties of the consolidating companies. The prior lien preferred stock was given priority as to dividends and liens over the other class of preferred stock. Provision was made for the redemption of the stock at any dividend period, after notice, at \$105.00 per share for the prior lien preferred and \$120.00 per share for the preferred, the par value being \$100.00. There are at pres-

Md.]

Opinion of the Court.

ent outstanding issues of the capital stock of the company as follows: Prior lien preferred, \$700,000.00; preferred, \$6,360,054.00, and common, \$6,300,034.00.

Section 408 of Article 23 of the Code, which was in force at the time of the issuance of the preferred stock, provided that any Maryland corporation having the power to issue bonds and to secure them by mortgage, or to obtain money on mortgage, might, in lieu of those methods, and in like amount, issue preferred stock and dispose of it by sale or subscription; that an agreement under seal might be executed by the corporation, to be acknowledged and recorded in the same manner as conveyances of land, guaranteeing a perpetual dividend of six per centum per annum on such preferred stock, out of the corporate profits, before any dividend should be distributed to the other stockholders; that the holders of the preferred stock should have all the incidents, rights, privileges and immunities and liabilities to which the capital stock of the corporation, or the holders thereof, might be entitled or subject; provided that no corporation should exercise any power under the section unless so authorized by a general meeting of the stockholders; and that the preferred stock should "be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other encumbrance." This legislation was repealed by Chapter 240 of the Acts of 1908. As originally enacted by Chapter 471 of the Acts of 1868, it provided for the issuance of preferred stock, but did not make it a lien. This latter feature was incorporated by Chapter 474 of the Acts of 1880. While no such difficulty as the one here involved can arise as to any issue of stock since the repeal of the statute, it is apparent that the question before us is one of great importance to interests which originated under the law during the twenty-eight years it was in effect.

It appears without dispute from the evidence in the record that a sale of the lot here in question would be advan-

tageous to the company and its stockholders, and is really necessary to be made in order that the capital invested in the property may become productive. After the removal of the company's office to a more suitable location in 1903 the building upon this lot was vacant until it was destroyed in the conflagration of 1904. Since that time the lot has been for sale, as it is not available for any of the company's purposes. The offer accepted from the appellants is shown to be fair and adequate. If the sale cannot be consummated because of the lien of the preferred stock, the company must be indefinitely encumbered with an investment which is not only unprofitable but expensive; and for the same reason other unproductive properties shown by the record to be owned by the company, representing an original aggregate cost of about \$200,000.00, and retained at a constant loss, must be held by it perpetually or until the entire issue of upwards of seven million dollars of preferred stock can be redeemed. It would be an anomalous situation if a lien provided for the protection of stockholders should prove such a serious embarrassment to the corporate body of which they are members and upon whose profitable operation they are dependent for the income value of their stock.

The holders of the two classes of preferred stock number more than eight hundred. Many of them are non-residents of Maryland and some reside in foreign countries. It was shown that it would be so difficult and expensive, and would cause so much delay, to bring them all into a proceeding or agreement for the discharge of the lien of the stock as to make that course entirely impracticable.

If the lien of the preferred stock were represented by a trustee duly appointed for the protection and enforcement of the rights of the stockholder lienors, or if the stock were held by a sufficiently limited number of persons to admit of their being made parties to a suit in equity, there could be no doubt, since the decision in *Baltimore City v. United Rys.*

Md.]

Opinion of the Court.

Co., 108 Md. 71, that upon a proper showing as to the advantage or necessity of a proposed sale of part of the corporate property in a proceeding to which the stockholders or their trustee were summoned, a decree could be obtained for the release of the property from the lien, and for the appropriation of the proceeds in such manner as to subserve the interests of those for whose benefit the security was created.

In the case cited the question was whether a lot of ground owned by the United Railways Company could be conveyed free from the lien of its income mortgage. The sale of the lot was beneficial to the company and its bondholders. There was no releasing clause in the income mortgage, although there was such a clause in a prior mortgage of the company's property. A bill had been filed by the company against the Maryland Trust Company, the trustee under the income mortgage, for the purpose of having it authorized and directed to release the mortgage as to the lot sold upon condition that the purchase money be subject to the trust of the mortgage and be applied, under the authority of the Court, to the purchase of other property which would be subject to the jurisdiction of the Court and to the lien of the income mortgage, or to the purchase of bonds which were liens on the property prior to that mortgage. The Court was also asked to retain jurisdiction of the case and thereafter authorize the trustee to execute releases of the lien of the mortgage on such property as the company might sell under the authority of the Court, when no longer needed for its railroad purposes or when its sale would be to the advantage of all parties interested. Subsequently another bill was filed by the trustee under the first mortgage, a holder of one of the first mortgage bonds and a holder of income bonds, against the railway company, the trustee under the income mortgage and a number of holders of income bonds, praying that the trustee under that mortgage be required to release the mortgaged property whenever ordered by the Court upon the petition

Md.]

Opinion of the Court.

of the company, answer of the trustee and testimony, that the purchase money be deposited subject to the order of the Court in some trust company until its use for the purchase of other property, or the reduction of the prior indebtedness, be authorized by the Court, and that the case be consolidated with the prior one above mentioned. A decree was passed for these indicated purposes; and later, upon proper petition, answer and evidence, an order was passed authorizing and directing the trustee under the income mortgage to release from its lien the lot involved in the case we have cited. In disposing of the question whether such an order would protect the purchaser of the lot against the lien of the mortgage the Court said: "We have no doubt about the validity of the order, and are satisfied that the appellant can acquire title to the property free of the lien of the mortgage to the Maryland Trust Company, trustee, as well as of those which contain releasing clauses." The proceeding was sustained upon the theory that the trustee under the income mortgage represented the bondholders for whose security the lien was created and who were too numerous to be brought in as parties, and that the release of the lien for the purposes of sale, when reasonably necessary, and reinvestment or other proper application of the proceeds, was beneficial to all the parties interested.

It is well settled, therefore, that the mere circumstance that no provision is made for releases in the instrument creating a lien on corporate property cannot prevent a release from being effected when it is shown to be to the advantage of the parties and when due precautions are taken for safeguarding their rights. This principle, it is clear, must be even more readily applicable to the statutory lien under consideration than to a lien created by mortgage. The preferred stockholder, though he holds a lien by way of special security, is nevertheless a member of the corporation. He has an immediate and substantial interest in all the corporate con-

Md.]

Opinion of the Court.

cerns. He is expressly invested with all the "incidents, rights, privileges, immunities and liabilities" of a stockholder. His dividends are payable only out of the "profits" of the company. His lien upon the corporate property and franchises does not make him a mere creditor, because the thing secured is not a debt which can ever be demanded of the corporation during its existence, but is simply and exclusively an interest in its capital stock. His relation to the corporate body is consequently much more intimate than that of the bondholder secured by its mortgage, for he is a part of the corporation itself and is a joint owner of the capital represented by the property upon which he holds his lien. If the company could under proper conditions insist, as against its mortgagees, upon a discharge of the encumbrance as to property whose disposition is necessary for the profitable management of its affairs, certainly such a right could not be denied with respect to its own members.

In the present case, therefore, if we were to hold that the property sold to the appellants could not be released from the lien of the preferred stock, that conclusion would have to be based upon the ground not that the corporation has no *right* to have it released, under the circumstances indicated in the record, but that the relief to which it is clearly entitled must be withheld merely because the parties interested in the lien are too numerous and distant to be summoned into Court.

While the general rule undoubtedly requires that all persons interested must be made parties to any proceeding by which they may be affected, yet to this rule there are well-recognized exceptions founded upon considerations of practical convenience and adopted to avoid a denial of justice. These exceptions are thus stated in *Story's Equity Pleading*, section 97: "(1) Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue

or defend may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the Court." In discussing the exceptions the learned author says: "It has been well observed that the general rule, being established for the convenient administration of justice, ought not to be adhered to in cases in which, consistently with practical convenience, it is incapable of application; for then it would destroy the very purpose for which it was established. The exceptions, therefore, turn upon the same principle upon which the rule is founded. They are resolvable into this, either that the Court must wholly deny the plaintiff the equitable relief to which he is entitled, or that the relief must be granted without making other persons parties." "It is obvious that under such circumstances the interests of persons not actual parties to the suit may be in some manner affected by the decree; but the suit is nevertheless permitted to proceed without them in order to prevent a total failure of justice. Indeed, in most, if not in all, cases of this sort the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament, the Court taking care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest." Secs. 96, 120.

The same doctrine was thus stated in *Wallace v. Adams*. 204 U. S. 425: "Now it is undoubtedly within the power of a Court of Equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right,—a class too large to be all conveniently brought into Court,—and make the decree effective not merely upon those individuals, but also upon the class represented by them."

In *Smith v. Swormstedt*, 16 How. 303, it was said: "Where parties interested in a suit are numerous their rights

Md.]

Opinion of the Court.

and liabilities are so subject to change and fluctuation by death or otherwise that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of a suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a Court of Equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the Court. The legal and equitable rights and liabilities of all being before the Court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

This principle was recognized in *Baltimore City v. United Rys. Co.*, *supra*, where the Court said, quoting with approval from 15 *Encyc. Pl. & Pr.* 629: "The doctrine of virtual representation rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice." It was given practical effect in *Diggs v. Fidelity and Deposit Co.*, 112 Md. 50, and in the second appeal in the same case, reported in 113 Md. under the title of *Orrick v. Fidelity, &c., Co.*, where it was applied to the very lien now being considered. In the first of these cases one of the questions related to the issuance of bonds for refunding purposes, after the consolidation, under the previously existing mortgage to which we have referred, and it was held that the Court below could authorize the issue after such an amendment of the proceedings as would bring before it "in person or by proper representation the holders of subsequent liens upon the property." These liens included that of the preferred stock of the consolidated corporation. In pursuance of the ruling mentioned, upon the remanding of the cause, "holders of some of both classes" of this stock were made parties for the purpose of representing that interest; and this met with the approval of this Court on the second appeal.

There are numerous authorities supporting this doctrine of representation, including *United States v. "Old Settlers."* etc., 148 U. S. 480; *Crease v. Babcock*, 10 Met. 525; *Hale v. Hale*, 146 Ill. 257; *Cassidy v. Shimmin*, 122 Mass. 409; *Blatchford v. Ross*, 54 Barb. 48; *Bacon v. Robertson*, 18 Howard, 480; *Hamblin v. Toledo Co.*, 47 U. S. App. 442, 36 L. R. A. 826; *Miller's Eq. Proc.*, secs. 48-49; 15 *Encyc. Pl. and Prac.*, p. 642.

The exigencies of the case before us bring it well within the principle we have considered, and we are clearly of the opinion that the lien of the preferred stockholders is dischargeable as to any particular part of the corporate property under a decree of a Court of Equity passed in a proceeding in which fairly selected representatives of that class are made parties, and in which the reasonable necessity for a sale is alleged and proven and suitable provision is made for the protection of the lienors with reference to the appropriation of the proceeds. In such a proceeding the decree should ordinarily appoint a trustee to join in the deed to the purchaser, for the purpose of releasing the lien of the stock, and to receive the purchase money for application or reinvestment under the direction of the Court. The course of procedure adopted by the vendor corporation in the present case was to file a bill for specific performance against the vendee and to bring in as co-plaintiff the trustee under the prior mortgage and as co-defendants some of the preferred stockholders of both classes. The allegations of the bill were full and explicit as to the necessity for the sale and its advantages to the company and its stockholders, and as to the fairness of the selection of the representative defendants. After answers filed, the facts requisite for the equitable relief sought were conclusively proven. The Court below, however, had previously assumed jurisdiction of the trust under the existing mortgage on the corporate property, to which the lien of the preferred stock was subordinate, and had author-

Md.]

Statement of the Case.

ized the Fidelity Trust Company, the trustee under the mortgage, to join with the mortgagor corporation in conveying the lot in question to the appellants, and, therefore, in the decree from which this appeal was taken, and which required the specific performance of the contract of purchase, no provision was made for the appointment of a trustee to join in the deed or to receive the purchase money, but the proceeds of sale were directed to be paid to the Fidelity Trust Company, in the trust proceeding to which we have referred, for proper disposition under the order of the Court, this being regarded as the method by which "the interests both of the preferred stockholders and of the bondholders under the prior mortgage could be best protected and subserved." This action would appear to afford substantial protection to the appellants as against the lien of the preferred stock, and there can be no question as to the right of the trustees under the prior mortgage to receive the purchase money in the first instance, but the appointment of a trustee for the preferred stockholders to join in the deed for the purpose of releasing their lien would probably afford a more efficacious exoneration of the title. We do not regard this of sufficient importance, under all the circumstances, to require the remanding of the case; but the action indicated, if desired by the purchasers, can be taken by supplemental decree.

Independently of the principle of representation upon which we rest our decision, there have been two theories presented in the argument upon which it is suggested that the sale in question may be made free of the lien of the preferred stock. The first is that the lien is not a fixed charge upon the property of the corporation during its active existence, but is intended only to control the distribution of its assets in the event of insolvency or liquidation. We have been unable to accept this theory, in view of the absolute terms in which the statute declares that the stock "shall be and constitute a lien" upon the corporate franchises and

property, and in view of the conclusion reached by this Court in *Heller v. Marine Bank*, 89 Md. 622, 623, where the nature of this statutory lien was discussed and where it was held that "the so-called preferred stock is a lien on the company's franchises and property owned at the time the stock was issued," but that "it could never have been the purpose of the statute to attach the lien to the articles produced for sale, as such a lien would effectually prevent any sale and would at once, as a consequence, stop the very business which the company was organized to conduct." It was for the reason that the lien was a fixed and not a floating charge on the corporate property that it was concluded that the Legislature must have intended that "articles produced for sale" should be exempt from its operation.

The second theory suggested is that as the lien of the preferred stock is made expressly "subject and subordinate" to the first mortgage, and as this contains a provision for the sale of any of the mortgaged property by agreement of the mortgagor corporation and the trustee for the bondholders, the lien of the stock should be regarded as liable to be divested by the exercise of this right of sale, where, as here, the agreement is actually effected. In *Baltimore City v. United Rys. Co.*, *supra*, the same suggestion was made in reference to the lien of the income mortgage there under consideration, which was "subject to the *provisions*" of the prior mortgage containing a releasing clause; but no opinion was expressed upon this question, as it was found not to be essential to the determination of the case. Even if we should here hold that a lien which is made simply "subject and subordinate" to a prior mortgage is in the same situation as if it were expressed to be "subject to the *provisions*" of the mortgage, we see no necessity for the determination of the question whether such a stipulation could be effective to discharge the lien of the preferred stock, as the view we have taken of this case is sufficiently comprehensive to contemplate sales of cor-

Md.]

Opinion of the Court.

porate property clear of such a charge, where the proceedings and proof justify such action, regardless of the existence of prior liens.

The sale here involved was made on April 13, 1910, and \$5,000.00 of the purchase money was paid at that time. It was agreed that the balance of the price should be paid two months later upon the conveyance of a "good and merchantable title to the vendee in fee simple." The decree below required the purchaser to pay the \$45,000.00 balance of the purchase money and the costs of the suit, but interest was allowed the plaintiff only from the date of the decree, and the taxes on the property were directed to be adjusted as of the same date. The appellants urge that as these proceedings were necessary to make the title good and marketable, in view of the unusual character of the lien of the preferred stock, they should not be subjected to the costs below or on appeal, and they request also that the taxes and interest be adjusted as of the date of the decree in this Court. In our judgment, it is equitable, under the circumstances of the case that the dispositions thus proposed as to the costs, interest and taxes should be adopted, and we will decree accordingly. The decree below will be affirmed in all respects except as to the costs, and it will be modified as to the interest and taxes.

Decree reversed as to costs and affirmed in all other respects, with the modifications as to interest and taxes indicated in the opinion. the appellee, the Consolidated Gas Electric Light and Power Company of Baltimore, to pay the costs above and below.

ALEXANDER A. FOREMAN *vs.* W. H. SADLER'S
EXECUTORS.*Restriction on Land Conveyed—Waiver of Restriction—Condition Subsequent.*

A corporation which owned a large tract of land conveyed three parcels of it to L. by a deed, containing this restriction in the habendum clause: "Provided, however, that the property herein mentioned shall be used only for residence purposes and that each dwelling erected thereon shall not cost less than four thousand dollars, and further provided that no liquors shall be sold on the premises." L. conveyed one of these lots to S. subject to the same restriction, but conveyed his other lots to other purchasers without any restrictions. The corporation conveyed several portions of said tract to different persons without any restriction, and subsequently the remaining part of its property was sold under a mortgage foreclosure without restriction. The purchaser of the lot so conveyed to S. objected to the title on the ground that it would be subject to restriction contained in the said deed. *Held*, that there is nothing in the language of the deeds to indicate that any other persons than the grantors therein would have the right to enforce the restriction, and since these two grantors no longer have any interest in other parts of the land, the restriction could not be enforced by them; that there is no evidence that the restriction was imposed in pursuance of a general scheme for the improvement of the land, or that the land granted was to be made subject to any easement or restriction in favor of the land retained, and that consequently the purchaser of the lot conveyed as aforesaid to S. can now obtain a title free from the restriction.

Decided January 13th, 1911.

Md.]

Opinion of the Court.

Appeal from the Circuit Court of Baltimore City (NILES J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS. PATTISON and URNER, JJ.

German H. H. Emory (with whom were *J. Hemsley Johnson* and *W. G. Olmstead* on the brief), for the appellant.

Charles F. Stein and *W. M. Ballou*, for the appellees.

BURKE, J., delivered the opinion of the Court.

The appeal in this case is from an order of the Circuit Court of Baltimore City by which a sale of a lot of ground located at the southwest corner of Edmondson avenue and Eighteenth street in Baltimore City made by the appellees, as executors of Warren H. Sadler, deceased, to the appellant was finally ratified and confirmed.

The record shows that on the 4th of April, 1895, William A. Oaks and others conveyed to the Lyndhurst Improvement Company of Baltimore City, a corporation, a tract of land containing two hundred and eighty-six acres, more or less, located partly in Baltimore City and partly in Baltimore County, and that on the same day that company executed a purchase money mortgage on the whole tract to the Guardian Security Trust and Deposit Company of Baltimore City to secure an issue of two hundred and forty thousand dollars of six per cent. coupon bonds. On September 18th, 1899, the company conveyed in fee to Esther C. Lambdin three parcels of said land, each parcel being described in the deed by metes and bounds. The restriction complained of in this case is found in the *habendum* clause of this deed, and is as follows: "Provided, however, that the property herein mentioned shall be used only for residence purposes and that each dwelling erected thereon shall not cost less than \$4.-

000.00, and further provided that no liquors shall be sold on the premises."

By deed dated May 16th, 1900, Esther C. Lambdin and husband conveyed in fee to Warren H. Sadler and wife, subject to the same restriction, one of these lots (the lot sold to the appellant), as tenants by the entirety. Mrs. Sadler died before her husband, and by operation of law he became the sole owner of the lot, subject to the legal effect, if any, of the restriction mentioned. The sole claim made by the appellant is that the title to the lot is now subject to the operation and effect of the restrictive covenant contained in the deeds from the Lyndhurst Company to Mrs. Lambdin and from Mrs. Lambdin and husband to Sadler and wife, and that either of said grantors could enforce that covenant against him as the grantee of the lot. The only question, therefore, presented by this appeal is: Can the appellees convey to the appellant a title to the lot sold free and clear of the restrictions imposed by the deeds referred to as to the mode of improvement and use of the property?

This restriction did not create a condition subsequent. It has been held repeatedly by decisions of this Court and elsewhere that words in a grant indicating the use to which property is to be applied do not of themselves create a condition subsequent. *Kilpatrick v. Baltimore*, 81 Md. 195; *Faith v. Bowles*, 86 Md. 13; *Baltimore City v. Day*, 89 Md. 555.

It is shown that the Lyndhurst Improvement Company sold and conveyed in fee to various persons parcels of the tract without restrictions of any kind, and that the restriction found in the deed to Mrs. Lambdin is the only one imposed by the company in any of its conveyances. The mortgage to which we have referred was foreclosed, and all the property owned by the Lyndhurst Company at the date of the foreclosure was sold free and clear of any restrictions. The evidence shows that Mrs. Lambdin in dealing with the property acquired under the deed from the Lyndhurst Company

Md.]

Opinion of the Court.

violated and disregarded the restrictions in important respects. She sold unimproved portions of the property without restrictions and improved other portions by erecting dwelling houses costing less than four thousand dollars, which she sold free of the restrictions. Mrs. Lambdin has disposed of all the property acquired by the deed of September 18th, 1899, from the Lyndhurst Company, except possibly a strip, not connected in any way with the lot sold in these proceedings one foot wide and one hundred and ten feet long. Upon this state of facts we have no difficulty in affirming the decree of the lower Court. The law upon the subject of restrictive covenants affecting real estate has been fully treated in cases in this Court. *Thurston v. Minke*, 32 Md. 487; *Halle v. Newbold*, 69 Md. 265; *Newbold v. Peabody Heights Company*, 70 Md. 499; *Peabody v. Wilson*, 82 Md. 186; *Summers v. Beeler*, 90 Md. 474; *Dawson v. Western Maryland R. R. Co.*, 107 Md. 70.

There is nothing in the language of the two deeds (the deed from the Lyndhurst Company to Mrs. Lambdin and the deed from her and her husband to Mr. and Mrs. Sadler) to indicate an intention on the part of the parties to them to confer upon any other persons a right to enforce the restrictions contained in those deeds, and the acts and conduct of the parties respecting the property show that no such right was intended to be conferred.

There are cases where the covenants or restrictions upon the use and enjoyment of the property granted, although expressed in such terms as to be binding by way of contract only upon the parties to the deed, have been construed to create a right or interest by way of easement in the remaining land of the grantor. But this has been held only, "when it appears, by a fair interpretation of the words of the grant, that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted, for the benefit of the other land owned by the grantor, and originally forming, with the land conveyed, one

parcel, such right being deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective parcels of lands." *Whitney v. Railroad Company*, 11 Gray, 359; *Thurston v. Minke*, 32 Md. 487.

The application of this doctrine is more frequently found in cases "where there is proof of a general plan or scheme for the improvement of property and its consequent benefit, and the covenant had been entered into as a part of a general plan to be exacted from all purchasers and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase." *Mulligan v. Jordan*, 50 New Jersey Eq. 364; *Summer v. Beeler*, 90 Md. 474; *Newbold v. Peabody Heights Company*, *supra*; *Peabody Heights Company v. Willson*, *supra*.

In the case of *Elliston v. Reacher* (1908), 2 Ch. D. 374, the Court, through JUSTICE PARKER, lays down the following rule as to the enforcement of restrictive covenants by purchasers *inter sese*: "It must be proved, (1) that both the plaintiffs and the defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the land purchased by the plaintiffs and defendant respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were so intended to be and were for the benefit of other lands retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchase their lots from the common vendor upon the footing

Md.]

Opinion of the Court.

that the restrictions subject to which the purchases were made were to inure for the benefit of the other lots included in the general scheme whether or not they were also to inure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases."

In the case before us there is an entire absence of proof of any general plan or scheme for the improvement of the land of the Lyndhurst Company of which the parcels sold to Mrs. Lambdin formed a part, nor is there any intention apparent from the deed or in the acts or conduct of the parties from which it could be held that the land granted was subject to any right or easement in favor of the land retained. It follows that neither the grantees of the Lyndhurst Company nor of Mrs. Lambdin can enforce this restriction. It would seem to be equally clear that the Lyndhurst Company cannot enforce it because it has no interest in the property. That restriction was evidently inserted for the benefit of the Lyndhurst Company, and all its property having been sold it has now no standing in a Court of Equity to enforce the restriction. "It is a fundamental principle of equity pleading that to entitle a party to sustain a bill he must show an interest in the subject of the suit, or a right to the thing demanded, and proper title to institute the suit concerning it." *Sellman v. Sellman*, 63 Md. 520.

This applies as well to Mrs. Lambdin, who has disposed of all her substantial interest in the property. Besides, her acts and conduct in dealing with the property, by violating and disregarding the material parts of the covenant, have been such as would estop her to enforce the covenant against her grantees. There appears to be no reasonable doubt that the appellees are able to convey the lot to the appellants free from the burden of the restriction complained of, and as the

effect of this restriction upon the title is the only question presented (the title in other respects being conceded to be free from objection), the order appealed from will be affirmed.

Order affirmed, the costs to be paid by the appellees out of the estate of Warren H. Sadler, deceased.

D. LEE HIGH ET AL. vs. JAMES D. POLLOCK ET AL.

Legacy Payable if Legatee Arrives at Certain Age Contingent, and Defeated by His Prior Death.

A testator devised his real estate to his wife for life and at her death to his two sons. He then charged the land devised to the sons with the payments to be made by them as follows: The said sons shall each pay at the death of the life tenant to the testator's daughter Sallie the interest on \$1,000 annually during her life. At the death of Sallie, the sons shall each pay the said interest to Sallie's son Walter until he has reached the age of twenty-four, "and upon the said Walter arriving at the age of twenty-four years, provided he arrives at that age after the death of his said mother, or if the said Walter is twenty-four years of age at the death of his mother, then each of my said two sons shall pay the sum of \$1,000 to the said Walter." Sallie and Walter both died before the life tenant, and Walter at the time of his death was twenty-one years old. Upon a bill by the heirs at law of Walter to enforce payment of the legacy to him as a charge on the land, *held*, that the legacy did not vest upon the death of the testator, but the same was contingent upon Walter's living until the age of twenty-four, and since he died at the age of twenty-one, the plaintiffs as his heirs are not entitled to the legacy.

Decided January 11th, 1911.

Md.]

Opinion of the Court.

Appeal from the Circuit Court for Allegany County (HENDERSON, J.)

The cause was argued before BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

Finley C. Hendrickson, for the appellants.

Ferdinand Williams and *William E. Walsh*, for the appellees.

PATTISON, J., delivered the opinion of the Court.

This appeal is from an order of the Circuit Court for Allegany County, sitting as a Court of Equity, sustaining the demurrer and dismissing the bill of complaint filed by the appellants against the appellees, asking for the sale of certain real estate that was devised unto James D. Pollock under the will of Joseph W. H. Pollock, to satisfy an alleged charge, thereby created, of one thousand dollars and interest thereon from the 28th day of February, 1892, said to be owing the appellees as the heirs of one Walter H. Cook.

On the 7th day of May, 1888, Joseph W. H. Pollock executed his last will and testament, by the first item of which he devised all his real and personal property wherever situated unto his wife, Hannah Katherine Pollock, for and during her natural life. By the second item he devised to his eldest son, James D. Pollock, subject to the life estate of his wife, Hannah Katherine Pollock, to take effect from and after her death, certain lands lying and being in Allegany County, Maryland. By the third item of his will he devised to his youngest son, Robert S. Pollock, likewise subject to the life estate therein devised to his wife, other real estate in Allegany County. In the fourth item of his will he devised unto his said sons, James D. Pollock and Robert S. Pollock, as tenants in common, likewise subject to the life estate of his wife, all the rest and residue of his real estate

in Allegany County. By the sixth item of his will he created the alleged charge, to enforce the payment of which the bill is filed in this case.

The language of said sixth item, so far as the same appertains to this alleged charge, is as follows: "I hereby charge the lands devised to my two sons, James D. Pollock and Robert S. Pollock, in Item Second, Third and Fourth of this will, with the sum of four thousand dollars, that is to say, the interest to each of them in the lands with the sum of two thousand dollars, and I hereby declare that said devises to them are made subject to the said charges, which shall be liens on their respective interests in said lands to the amount of two thousand dollars. The said James D. Pollock and Robert S. Pollock shall each pay my said daughter, Sallie High, the interest on one thousand dollars, at the rate of six per centum per annum, during her natural life, which said interest shall be payable annually, and shall be calculated from the death of my wife, the first payment to be at the end of one year from her death. Upon the death of my said daughter my said sons shall pay the said interest on the said sums of one thousand dollars each to Walter H. Cook, who is a son of my daughter, Sallie High, by her first marriage, until he has reached the age of twenty-four years, and upon the said Walter H. Cook arriving at the age of twenty-four years, provided he arrives at that age after the death of his said mother, or if the said Walter H. Cook is twenty-four years of age at the death of his mother, then each of my said two sons shall pay the sum of one thousand dollars to the said Walter H. Cook, or for his benefit, in the way that my said two sons may think of most benefit to him, and upon payment of the same as aforesaid, the said lands of James D. Pollock and Robert S. Pollock shall each be released from the said liens to the amount of one thousand dollars."

The testator died in June, 1888, survived by his wife, Hannah Katherine Pollock; Sallie High and Walter H.

Md.]

Opinion of the Court.

Cook. Sallie High died March 16, 1891, and her death was followed by that of Walter H. Cook on June 7th, 1891, at the age of twenty-one years, leaving Hannah Katherine Pollock, the life tenant, surviving both him and his mother, who died February 28th, 1892.

The complainants in their bill allege the facts which we have stated, and further allege that Walter H. Cook died, leaving D. Lee High, Ella C. Sellers and Ettie Sellers, the appellants, brother and sisters of the half blood, his only heirs at law. They further allege that neither Walter H. Cook nor his said heirs at law have received any portion of said charge of one thousand dollars nor any interest thereon, and that they are entitled to a decree for the sale of the real estate so devised to James D. Pollock to satisfy said charge and interest. To this bill the appellees demurred, and the Court sustained the demurrer and dismissed the bill. It is from this order of the Court so sustaining the demurrer and dismissing the bill that this appeal is taken.

We are called upon in this case to determine what interest or estate in the one thousand dollars made a charge upon the lands devised to James D. Pollock passed to Walter H. Cook under the will of Joseph W. H. Pollock. It is contended by the appellants that the estate or interest taken therein by Walter H. Cook, under the will, was vested in him immediately upon the death of the testator, although the enjoyment thereof was postponed until after the death of both his grandmother, Hannah Katherine Pollock, the life tenant, and his mother, Sallie High, and until he reached the age of twenty-four years; or, that is, the payment of the interest thereon to him was postponed until after the death of his grandmother and mother and the payment of the principal sum of one thousand dollars was postponed until the death of both his grandmother and mother, and until he arrived at the age of twenty-four years. While, on the other hand, it is contended by the appellees that the interest or

estate in the principal sum of one thousand dollars, taken by him under the will, did not vest in him immediately upon the death of the testator, but its vesting was contingent upon his arriving at the age of twenty-four years; and as he died before reaching that age, that it never vested at all, and as he did not survive his grandmother, the life tenant, he was never entitled to any interest therein; and consequently there was nothing to pass to the appellants who are claiming through him.

The question, therefore, presented by this appeal is: When was the interest or estate taken by Walter H. Cook under the will of Joseph W. H. Pollock to vest in him; that is, did it vest in him upon the death of the testator, or was it contingent upon the legatee arriving at the age of twenty-four years?

As was said by JUDGE PEARCE in *Poultney v. Tiffany*, 112 Md. 633: "The question of when an estate shall vest in interest, where there is more than one period mentioned at which it would be possible for it to vest, is one which has long perplexed the Courts and in reference to which there has been such great diversity and confusion of judicial opinion that it would be idle to attempt to reconcile all the cases even in any one jurisdiction. Two fundamental principles of construction, however, have been firmly established in all jurisdictions administering the principles of the common law—first, that the law favors the early vesting of estates and the Courts will, as a general rule, where there is more than one period mentioned, adopt the earlier one if this does not contravene the actual intent of the testator or donor as deduced from the terms of the instrument; second, that notwithstanding the preference of the law for early vesting, the testator or donor has the absolute right to fix the period of vesting at his pleasure and to make it depend upon a contingency, and when he has done this with reasonable certainty his wishes will prevail and the estate will not vest

Md.]

Opinion of the Court.

until the happening of the contingency.' *Larmour v. Rich*, 71 Md. 369."

Therefore in interpreting the language of the testator used in his will we are to be governed by these fixed and established rules, and unless we find from the language so used by him that it was his intention to fix the period of the vesting of the estate upon the contingency of the arrival of the legatee at the age of twenty-four years, then we must fix the vesting of interest at the earlier period, to wit, upon the death of the testator.

The testator, in the sixth item of his will, uses this language: "Upon the death of my said daughter my said sons shall pay the said interest on the said sum of one thousand dollars each to Walter H. Cook, who is a son of my daughter, Sallie High, by her first marriage, until he has reached the age of twenty-four years, and upon the said Walter H. Cook arriving at the age of twenty-four years, *provided he arrives at that age after the death of his said mother, or if the said Walter H. Cook is twenty-four years of age at the death of his mother* then each of my said two sons shall pay the sum of one thousand dollars to the said Walter H. Cook, or for his benefit, in the way that my said two sons may think of most benefit to him." The difficulty in this case is largely produced by the insertion of the clause or expression therein contained which we have italicized, to wit, "*provided he arrives at that age after the death of his said mother, or if the said Walter H. Cook is twenty-four years of age at the death of his mother.*" Without it it would read: "And upon the said Walter H. Cook arriving at the age of twenty-four years, then each of my said two sons shall pay the sum of one thousand dollars to the said Walter H. Cook." We must therefore inquire into the meaning of these words to ascertain the intention of the testator.

After the death of the testator's wife the interest on the one thousand dollars was to be paid to the daughter (if she

was then living) so long as she might live, and at her death the interest was then to be paid to Walter H. Cook until he reached the age of twenty-four years. This was the time fixed at which the payment of the interest should cease, and the time at which the principal sum of one thousand dollars was to be paid to Walter H. Cook, subject, however, to the proviso expressed by the language given. This proviso is in the alternative—that is, provided he arrives at that age after the death of his mother, or should be twenty-four years of age at the death of his mother. Therefore, he was to arrive at that age either after or before the death of his mother, and as this covered the whole time, it is equivalent to saying, provided he arrives at the age of twenty-four years, or provided he shall reach the age of twenty-four years before dying. With this interpretation the language of the will would read: Upon the said Walter H. Cook arriving at the age of twenty-four years, *provided he shall reach the age of twenty-four years*, then each of my said two sons shall pay the said sum of one thousand dollars to the said Walter H. Cook, etc. Thus we must determine from this language whether the testator, by the use of it, defeated the operation of the rule above quoted, and fixed the date of the vesting of the estate at the arrival of the legatee at the age of twenty-four years and that its vesting was contingent upon the happening of that fact.

“The word *provided* is a conditional term; so that if a bequest were made to B, ‘provided’ he attain twenty-one, the legacy will not vest in him before he arrives at that age.” *Roper on Legacies*, 567.

In the case of *Webb v. Webb*, 92 Md. 113, the language used by the testator was: “To each of my grandsons, the sons of my deceased son, George Prescott Webb, who may live to reach the age of twenty-one years.” This Court, speaking through JUDGE SCHMUCKER, said: “These legacies were given upon the plain condition that each legatee must arrive at the

Md.]

Opinion of the Court.

given age to entitle him to take at all, and they are, therefore, not vested but contingent legacies, and do not begin to bear interest until the title to them vests by the happening of the condition upon which they are predicated."

We think the language used by the testator clearly discloses the intent on his part to make the vesting of this estate contingent upon the legatee reaching the age of twenty-four years, and thereby takes it out of the rule above given, and as the legatee died before reaching this age the estate never vested in him.

It has been urged by the appellants that the facts of the creation of the charge as it was created, and the provision for a release upon the payment of the money, if ever paid to the legatee by the devisees; with the further provision in the will providing for the payment over of this money to and the taking of releases from certain persons appointed as trustees in other items of the will, if the devisees at any time before the time of its payment under the will, desired to release the lands so held by them from the lien of said charge, so far indicated the intent of the testator to vest the estate immediately in the legatee upon the death of the testator, that they overcame any and all other expressions of the testator found in his will that might indicate that it was his intention to postpone the vesting of said estate and make it contingent upon the arrival of the legatee at the age of twenty-four years. In this we cannot agree with them. The testator charges the lands with the sum stated in the will, not alone to secure the payment of the sum of one thousand dollars, if under the will it should ever become payable, to the legatee, but likewise to secure the payment of the interest to his mother and to himself so long as it was payable under the terms of the will. It was not made to secure the payment of a present gift made to him under the will to be enjoyed in the future. but, as we have said, was made as a security for the payment of the interest to the parties entitled

and to secure the payment of the principal sum to the legatee should it ever become payable to him by the happening of the contingency of his arrival at the age of twenty-four years; and the provision for the release was made to apply only in the event of the payment over to him upon the happening of the contingency aforesaid. The provision of the will above referred to, enabling the devisees to obtain releases from the trustees therein named, provided that upon the payment of this money the trustees were to invest the same "for the benefit of said parties respectively until the principal can be paid under the foregoing provisions and in accordance with them." This latter provision cannot, we think, materially strengthen the contention made by the appellants that this money was to be paid by the purchasers without regard to the happening of the contingency above referred to. It was to be invested and the interest thereon paid to the parties entitled thereto under the provisions of the will, and the principal sum to be held by them awaiting the happening of the contingency or until it could be ascertained what disposition should be made of it.

From what we have said we think the Court below committed no error in sustaining the demurrer and dismissing the bill. The order therefore is affirmed, with costs to the appellees.

Affirmed.

Md.]

Syllabus

MARY G. DINNEEN vs. THE CORPORATION FOR
THE RELIEF OF THE WIDOWS AND CHILDREN OF THE CLERGY OF THE PROTESTANT EPISCOPAL CHURCH OF
THE DIOCESE OF MARY-
LAND ET AL.

*Grant of Land Binding on Centre of Existing Private Road—
When Grantee Takes Subject to Easement of
Way—Closing the Road.*

The grantee of land described as including one-half of an existing private road, then in open use by other parties, acquires only a fee in the road subject to the easement of way.

When the owner of land which is crossed by a private way of his own, conveys a lot described as extending to the centre of the road, the grantee takes a fee to the centre, and the grantor owns the other half in fee, while the grantee by implication takes a right of way over the half retained by the grantor, subject to a like right in the latter over the half conveyed.

Defendant, the owner of a tract of land, conveyed a portion of it to one F., and there was then made a private roadway leading through the land retained by the grantor to the part conveyed to F. While this roadway was not the only means of access to F.'s tract, it was reasonably necessary for the same, and was an open and visible easement. Afterwards the defendant grantor conveyed to the plaintiff lots of ground described as including one-half of said roadway. Plaintiff built a fence across one-half of the road as described in his deed, which was removed by the defendant. Upon a bill asking for an injunction to restrain such interference, *held*, that as between the defendant and F. the latter was entitled to an easement in the road, and that the title acquired by the plaintiff was subject to this visible easement, and the plaintiff is

therefore not authorized to close the road, but owns the fee in it subject to the right of way over it possessed by F. and by the abutting owners on the opposite side of the roadway. *Held*, further, that no question of dedication is involved in the case.

Decided January 11th, 1911.

Appeal from the Circuit Court of Baltimore City (STOCKBRIDGE, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

Henry H. Dinneen, for the appellant.

Leigh Bonsal and *Clarence A. Tucker*, for the appellees.

URNER, J., delivered the opinion of the Court.

The appellant is the owner of certain land in the suburbs of Baltimore City under a deed whose descriptive lines extend along the center of an existing road which was mentioned in the deed and shown on the plat to which it referred. Whether the appellant has the right to close the road, under the circumstances indicated in the record, is the question to be determined on this appeal.

The case originated in a bill in equity, filed by the appellant, to restrain the removal of a fence which she had constructed along the centre of the road. It was alleged in the bill that the complainant, on or about June 10th, 1904, purchased from the defendants two lots of ground in fee described in their deed to her of that date duly exhibited; that the first line of the land so conveyed is located in the centre of a private road leading from the intersection of Holly avenue and Seventeenth street, both of which are public thoroughfares, to an adjoining four-acre tract upon which is

Md.]

Opinion of the Court.

located Mt. Holly Inn; that at the time of the complainant's purchase the adjacent tract was also owned by the defendants; that her part of the private road is subject to no easement in the defendant or the public generally; that in order not to be barred as to her right to the portion of the road included within the lines of her deed by the provisions of the Act of 1908, Chapter 583, approved April 8th, 1908, declaring a conclusive presumption of dedication in reference to roads situated like the one in question in Baltimore City, if left open for more than one year after the passage of the Act, the complainant on April 1st, 1909, "fenced in her portion of said road hereinbefore referred to with a post and wire fence; secured signs thereon stating that said road was closed pursuant to law and strung lanterns on said fence at night to warn drivers and pedestrians of such fact." The bill further averred that on or about April 6th, 1909, the defendants removed a portion of the fence and announced their intention to remove it as often as it might be reconstructed; and that the acts of the defendants, with the consequent liability to loss of her rights under the Act of 1908, subject the complainant to irreparable injury for which she has no adequate remedy at law.

By way of answer and cross-bill the defendants, after certain admissions and denials, not necessary to be noticed, alleged that the road referred to in the complainant's deed and shown on the plat, which is exhibited with the answer, was laid out in 1901, by the owner of all the property embraced in the plat, and has since been freely used by the patrons and owners of the Mt. Holly Inn, and also by the owners of all the other property which the plat indicates; that at the time of the execution and delivery of the complainant's deed the defendants were the owners of all the land served by the road, except the inn tract, a ninety-nine-year leasehold estate in which they had previously contracted to sell and shortly afterwards conveyed to James L. Filon, taking a mortgage for part of the purchase money; that the

road was then clearly defined, open, macadamized and much used; that the complainant purchased the property described in her deed subject to this known and visible condition and use of the road; that it is in fact a way of necessity for the inn tract, and also for a larger tract to the west belonging to the defendants, and that neither of these tracts have any other available means of entrance or exit. The defendant prayed for a mandatory injunction requiring the plaintiff to remove the obstruction placed by her in the road.

To the cross-bill the plaintiff filed an answer denying its sufficiency to entitle the defendants to the relief prayed. The answer alleges that at the time the plaintiff acquired her title the road in controversy was rough and ill-kept, and had been but recently opened. It denies that it was and is a way of necessity for the inn tract or any other land, because as it avers there is a road, other than the one fenced by the plaintiff, which leads from the Windsor Mill road, a public thoroughfare, to the Mt. Holly Inn, and affords access to all the land shown on the plat; it further denies that the erection of the fence was in violation of any of the rights of the defendants or their grantee Filon, and relies upon the omission of any express reservation to the grantors in the plaintiff's deed of an easement in the part of the road included within its description.

At the time of the filing of the bill of complaint Mr. Filon, the grantee of the Mt. Holly Inn property, was dead, and letters of administration had been granted to his widow, Mary L. Filon by the Orphans' Court of Baltimore City. Subsequently the defendants sold and conveyed to Mrs. Filon the remainder of the land abutting on the road in question, subject to a mortgage for a portion of the purchase price, and as the title to the leasehold estate conveyed to her husband in the inn tract passed to her as administratrix, she was, upon due application, made a party defendant in both her individual and representative capacities. Her answer adopts that of the original defendants, and avers that when

Md.]

Opinion of the Court.

she acquired her property the road in its present location was open, unobstructed and in constant use, and that she and her predecessors in title have from time to time improved the roadway, with the full knowledge of the plaintiff, and have thereby incurred large expense for the resurfacing of the road with crushed stone and for constructing and maintaining a footpath, hedges and fences along the side, all of which was done openly and with the assent of the plaintiff, who is alleged to be estopped from asserting that the road is not dedicated to the public, or from setting up any right or title therein, except that of user.

A preliminary injunction was issued upon the bill when it was filed, but this was dissolved upon motion after the filing of the answer and cross-bill, all rights of the plaintiff being reserved for determination by the final decree. The case was then brought to issue by general replication, and after the hearing upon an agreed statement and evidence offered, a decree was passed by the Court below denying the right of the plaintiff to maintain her fence along the centre of the road; but it appearing that the road as actually used encroached to a slight extent upon the plaintiff's land at two points the decree provided that the plaintiff might, without interference by the defendants, enclose within her fence the portion of the roadway extending beyond its platted limits.

The evidence in the case showed that about a year before the plaintiff obtained her deed she entered into possession of part of the lot it describes under a lease which included an option for the purchase of the whole of the lot, and that Mr. Filon, about the same time, entered into the occupancy of Mt. Holly Inn under a contract of purchase. The plaintiff's lease and option was dated June 1st, 1903, while Mr. Filon's contract bore date May 27th, 1903, but the testimony was conflicting as to whether the latter's possession began and was known to the plaintiff prior to her own entry as lessee upon the adjacent premises. It was shown without contradiction, however, that at the time the plaintiff exercised her

option to purchase and accepted her deed the road now in litigation was an open thoroughfare in constant use by Mr. Filon, the guests of the inn, the plaintiff and the public generally; that the plaintiff gave Mr. Filon the stone from another road which extended across her ground from the inn tract and which she fenced in without objection from anyone; that the stone so given was used in the improvement of the road which is now sought to be closed; and the plaintiff herself co-operated in keeping it in repair.

The plaintiff's case is not in any way predicated on the option to purchase contained in her lease, which is not even referred to in the bill of complaint, but is distinctly made to depend upon the terms and description of her deed. It appears that the option simply conferred the right to buy within the specified time all of lot No. 3, as shown on the plat already mentioned, and the lines of the latter are so arranged as to apparently exclude the bed of the road in question from the limits of the lot so designated. The sole question is whether the conveyance to the plaintiff by the deed of June 10th, 1904, of a lot of ground described as including half of an indicated and platted roadway, entitles her to close the road by extendnig her fence to its centre line; and this question arises in a case in which the road, at the time of the acquisition of title by the plaintiff, was in actual, visible and continuous use as a way appurtenant to an adjoining property which was then, and had been for a year, in possession of a purchaser under a valid and binding contract.

As between Mr. Filon and his vendors there can be no doubt that an easement in the roadway which furnished access to the inn from the street railway and the public streets of the city passed to him by implication under his purchase of the property. It is well settled that "if during the unity of ownership the owners of two properties use one for the benefit of the other in such manner as would have given rise to the presumption that an easement existed, if the tenements had been held by different persons, then upon a con-

Md.]

Opinion of the Court.

veynace of the property so used an easement will be granted to the purchaser, provided the use has been such that the easement resulting from it would be of the class known as continuous and apparent, and would be necessary for the reasonable enjoyment of the property conveyed." *Eliason v. Grove*, 85 Md. 225; *Mitchel v. Seipel*, 53 Md. 251; *Janes v. Jenkins*, 34 Md. 1; *Oliver v. Hook*, 47 Md. 301; *Bowers v. Gallagher*, 62 Md. 462. In the case first cited the reason for the rule was stated to be that "if at the time of the purchase of property there are visible and apparent easements and privileges annexed to it, which are necessary for its reasonable enjoyment, we must assume that they were taken into consideration when the price was agreed upon, and that the use of them was paid for."

The case before us is well within this principle. The road in question was not only an open and visible easement, but it was reasonably necessary as a means of access to the inn, the other road to which reference has been made having, according to the testimony, been rendered unfit for travel by the construction of a railway cut through the property about the year 1901, in consequence of which the road now in controversy was opened.

It is clear, therefore, that when the plaintiff exercised her option and received her deed the roadway to which it refers was subject to an easement equitably vested in a purchaser in possession of the dominant tenement.

The rights subsequently acquired by the plaintiff must be held to be subordinate to those which passed under the earlier sale, as she was fully aware of the possession of the prior purchaser and hence had constructive notice as to the nature and extent of his interest. *Duval v. Wilmer*, 88 Md. 66.

The original defendants, when they conveyed Lot No. 3 to the plaintiff, and at the institution of this suit, had not parted with the land abutting on the opposite side of the road, and lying east of the Mt. Holly Inn tract, and we have yet to consider the question as to the rights of those defend-

ants, and their successor in title, with respect to the use of the roadway as an easement appurtenant to the last-mentioned premises. The general rule is that when the owner of land intersected by an established private way of his own conveys a lot described as extending to the center of the road, the grantee takes a fee to the centre and the grantor owns the other half in fee, while the grantee, by implication, takes a right of way over the half retained by the grantor subject to a like right in the latter over the half conveyed. *Jones on Easements*, sec. 226.

This rule is clearly and justly applicable to the present case, and accords to the plaintiff the same and only such rights in the road as those to which the opposite abutting owners are entitled.

It appears from the record that in November, 1904, the original defendant and Mr. Filon entered into an agreement, in writing, providing for the opening of a roadway about fifty feet in width along the course of and including the platted road. The additional ground required was to be taken from the abutting land of the defendants to the south. The agreement in terms was "subject to the right" of the plaintiff under her deed from the defendants. It was argued that this was a recognition of the plaintiff's alleged ownership of the half of the bed of the platted roadway embraced in the deed. We think it is clear, however, that the purpose of this provision was simply to respect the plaintiff's right to the use of the road in common with the opposite abutting proprietors in accordance with the principle we have last stated.

The Act of 1908, Chapter 583, referred to in the bill of complaint, has not entered into our consideration of the case. It was mentioned as the occasion for the plaintiff's effort to close the half of the road in which she claimed exclusive ownership, but the terms of the Act do not affect the matters submitted for our determination.

Md.]

Syllabus.

The view we have taken of the case makes it unnecessary to consider the question whether the principle of dedication is applicable to such a situation as is here presented. The exceptions to testimony filed by the respective parties need not be reviewed, as our conclusions are based upon facts and evidence as to which there is no dispute or objection.

Decree affirmed, with costs.

LENNIE S. BRENGLE vs. DANIEL TUCKER, ADMINISTRATOR, ETC.

Invalidity of Will Subscribed by Only One Witness.

While a man was lying ill on a bed in a hospital, and just before he was taken to the operating room, he asked the attending physician for a piece of paper and pencil, and wrote a short testamentary disposition of his property. He handed the paper to the physician and asked him to sign it, which was done. Then he gave the paper to the petitioner, who was at hand, in the presence of other persons, who knew that the paper was a will. The man died after the operation. *Held*, that this paper cannot be admitted to probate as a will, since Code, Art. 93, sec. 317, expressly provides that unless a will be attested and subscribed in the presence of the testator by two or more credible witnesses, it shall be utterly void and of none effect.

Decided January 11th, 1911.

Appeal from the Orphans' Court of Frederick County.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

H. Dorsey Etchison, for the appellant.

The Court declined to hear counsel for the appellee.

BURKE, J., delivered the opinion of the Court.

Charles A. Tucker, of Frederick County, died in the Hebrew Hospital in Baltimore City on the 26th of July, 1910, possessed of quite a large estate consisting of real and personal property. On the afternoon of July 25th, 1910, he wrote and signed a paper in the following words, which he immediately delivered to Lennie S. Brengle, the appellant: "In the event of my death the houses and ground rents shall revert to Lennie Brengle, of Frederick. The balance in Frederick, Md., to be shared outside to the cousins in Cumberland, Md."

This paper writing was witnessed and subscribed by F. H. Hermann, M. D. On July 28th, 1910, the paper was left for safekeeping in the Office of the Register of Wills of Frederick County. The Orphans' Court for that county being of opinion that Charles A. Tucker had died intestate, granted letters of administration upon his estate to Daniel Tucker, the appellee, who qualified and proceeded to administer the estate. On August 8, 1910, the appellant filed a petition in that Court asking that this paper writing be admitted to probate as the last will and testament of Chas. A. Tucker, deceased, and that letters of administration upon his estate be granted to some suitable person, inasmuch as no executor was named in the alleged will. The petition further stated that the letters granted to the appellee should be revoked. On August 19th, 1910, the appellant filed an amended petition asking for the probate of the paper writing as the last will and testament of Charles A. Tucker and setting out some facts additional to those contained in her first petition.

The circumstances under which the writing was executed and upon which it is contended that it should have been ad-

Md.]

Opinion of the Court.

mitted as the last will and testament of the deceased are fully set forth in the original and amended petitions. In the original petition it is alleged that "the said Charles A. Tucker was taken to said hospital by his physician, Dr. F. H. Hermann, on the morning of said July 25, 1910, and between one and half-past one o'clock your petitioner was telephoned for by said Dr. Hermann to come to the hospital, and in response to that summons your petitioner went at once; upon arrival there she consulted with Dr. Hermann and his assistant, Dr. Bagley, and the nurse, Miss Duke, about Mr. Tucker's condition; she was informed by them that they were watching the patient carefully and considering the advisability of an operation; this watching occupied the time until nearly three o'clock, when Dr. Hermann called your petitioner out of the room where Mr. Tucker was and informed her that an operation had been decided upon; that it is imperatively necessary and would have to be performed without any delay, and desired to know if she, your petitioner, would consent; in reply to this advice of Dr. Hermann your petitioner said that if he, Mr. Tucker, was satisfied she was; thereupon all the parties, including your petitioner, entered the sick room, and Dr. Hermann went to where Mr. Tucker lay on the bed and told him that the only hope he had was to be operated on, and that hope was poor; he further told him that he supposed he realized his condition, and Mr. Tucker replied, 'yes'; Mr. Tucker then asked Dr. Hermann to set him up in bed, and this was done; then Mr. Tucker asked Dr. Hermann for a piece of paper and pencil and Dr. Hermann immediately took his prescription book out of his pocket, tore a leaf out, handed it to Mr. Tucker, together with a fountain pen. Mr. Tucker, while sitting up in bed, immediately laid the piece of paper given him upon the prescription book and wrote the paper writing mentioned in the first paragraph of this petition; he then handed the paper to Dr. Hermann which he had writ-

ten and which was still on the book, retaining a partial hold of said book and paper and asked Dr. Hermann to sign it. and as soon as Dr. Hermann signed it he, Mr. Tucker, immediately gave the paper one fold, and handed it to your petitioner, and without anyone in the room knowing the contents of said paper except Dr. Hermann, who was leaning over Mr. Tucker while he was writing said paper, your petitioner not even knowing its contents, your petitioner took said folded paper as soon as given to her by Mr. Tucker, placed it in her purse; as soon as this paper writing was thus handed, as described, to your petitioner, the doctors and nurse immediately moved the bed upon which Mr. Tucker was lying out of the room without a minute's delay and placed it on the elevator and was taken to the operating room; Dr. Hermann and your petitioner walked up the steps and was taken to a room next to the operating room, from which your petitioner watched the operation, which was begun immediately upon his arrival in the operating room; from the time Mr. Tucker was taken to the operating room until he was returned to his sick room about a half an hour elapsed; your petitioner was permitted to see Mr. Tucker and talked with him twice between four o'clock and midnight of that same day after the operation was performed, and at midnight when your petitioner left him; this was the last time she saw him alive."

The amended petition set out substantially the same facts, and in addition thereto alleged that the persons present had a general knowledge that the deceased in writing the paper was endeavoring and attempting to make his last will and testament, and that "the said paper writing is the last will and testament of Charles A. Tucker, and that the said Charles A. Tucker made every effort in his power to have the same in legal form and properly witnessed, but that the said Charles A. Tucker being at the time the said will was made in immediate fear of death, though of sound and disposing mind, was prevented by death from completing all the for-

Md.]

Opinion of the Court.

malities usually necessary in such instruments; that the said Charles A. Tucker at times innumerable expressed his intention of devising all of his estate, both real and personal, to your petitioner and to his cousins, who reside in the City of Cumberland, Md., and had expressed himself as being absolutely opposed to any relative on his father's side receiving one penny of his estate; that the said Charles Tucker, when he made his last will and testament, carried out his said intentions without any intimidation and without any pressure being brought to bear upon the said Charles A. Tucker; that the said will was witnessed at the request of said Charles Tucker by the said Dr. Hermann on the face of the said paper, and by your petitioner and others, all of whom were in the room at the time the same was made and in the presence of the said Charles Tucker, although they failed to sign their names thereto as witnesses."

Both the original and amended petitions were answered by the appellee, and the Court, after hearing, passed an order dismissing both petitions; but ordered the costs of the proceeding to be paid out of the estate of the deceased. This appeal was taken from that order.

On these facts the single question presented is this: Is the paper writing mentioned the last will and testament of Charles A. Tucker? Undoubtedly he intended it to be, and if it is not great loss will fall upon the appellant, as he evidently intended and attempted to give her a considerable portion of his estate. This is not a question upon the construction of a valid will, where the intention of the testator must prevail, unless it contravene some fixed rule or policy of the law. The simple inquiry is whether the formalities prescribed by law in the execution of wills have been complied with. All the authorities hold that these must be complied with or the instrument will be invalid and the property will descend as if no will had been made. Therefore, the failure of the testator's intention and the resulting loss to the appellant cannot be considered upon the question before us.

It is admitted that the paper is invalid as the last will and testament so far as it concerns the real estate, but it is insisted that it is sufficient to pass personal property. In view of the positive and unambiguous declaration of the statute, and of the adjudged cases, it is difficult to see how this contention can be made. Precisely the same formalities are required in the execution of a will to pass personalty as are required in wills to pass real estate. *Article 93, sec. 317, Code 1904*, declares that: "All devises and bequests of any land, or tenements, or interest therein, and all bequests of any goods, chattels, or personal property of any kind, as described in section 314, shall be in writing and signed by the party so devising or bequeathing the same, or by some other person for him in his presence and by his express direction, and shall be attested and *subscribed in the presence of the said devisor by two or more credible witnesses or else they shall be utterly void and of none effect.*"

To subscribe means that the witnesses shall sign their name to the same paper for the purpose of identification, and implies that attestation has been performed. The statute requires that the testator shall request the subscribing witnesses to attest his will; but it is not necessary that he should in terms ask them to sign, as other facts may constitute a legal request on his part. *Higgins v. Carlton*, 28 Md. 140; *Gross v. Burneston*, 91 Md. 383.

There is only one subscribing witness to this paper writing, and he was the only one who was asked by the deceased to attest the same. It is, therefore, clear that the provisions of the statute have not been complied with, and that the attempted devises and bequests are, in the language of the statute, "utterly void and of none effect."

This conclusion is fully supported by the cases of *The Trustees of the Western Maryland College v. McKinstry*, 75 Md. 189; *Gross v. Burneston*, *supra*; *Lindsay v. Wilson*, 103 Md. 252, and other cases.

Md.]

Syllabus.

The statute was passed to remove uncertainty in the making of wills and to prevent the practice of imposition and fraud upon testators. To admit the appellee's contention would in effect be a nullification of the statute and a restoration of the law as to personal property as it existed prior to the *Act of 1884, Chapter 293*.

Order affirmed, the costs in this Court to be paid by the appellant.

CHARLES E. S. STOUFFER, ADMINISTRATOR, vs.
JOHN B. WOLFKILL.

Bill to Vacate Transfer of Money Made by the Decedent for Lack of Capacity, Fraud and Undue Influence—Insufficient Evidence of Allegations—Res Judicata.

- A bill in equity by an administrator alleged that the defendant, who had been the agent of the deceased intestate, obtained from him in his lifetime a check for upwards of \$4,000, the proceeds of which the defendant had converted to his own use; that at the time the check was obtained the deceased was an old man, incapable of managing his affairs, and that the money had been procured by undue influence and fraud. *Held*, upon an examination of the evidence, that these allegations are not sustained, but that the proof shows that the gift to the defendant was the free and unconstrained act of the decedent, and that he was at the time capable of making a valid contract.
- A. rendered services for many years for his uncle, under a promise of compensation. Shortly before his death his uncle gave A. a check for about \$4,000, which was cashed. Afterwards A. brought suit against the administrator of his uncle's estate to recover for services rendered him, and in his account

allowed a credit of \$4,000. At the trial of that suit the check was given in evidence and the jury rendered a verdict for the plaintiff for a part of his claim, upon which judgment was entered. *Held*, upon a bill by the administrator of the uncle alleging that the check had been obtained by A. by fraud and undue influence, that the indebtedness of the deceased and the validity of the payment on account had been established by that judgment, and the matter is now *res judicata*.

Decided January 12th, 1911.

Appeal from the Circuit Court for Washington County (KEEDY, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and TURNER, JJ.

H. F. Wingert (with whom were *Alex. Neill, Jr.*, and *Miller Wingert* on the brief), for the appellant.

Charles D. Wagaman and *D. W. Doub*, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is a bill in equity, brought in the Circuit Court for Washington County by the appellant, administrator of Hiram D. Stouffer against the appellee, John B. Wolfkill, acting as attorney-in-fact, under a power of attorney, from the appellant's intestate, to account for the proceeds of a check amounting to \$4,667.07, which it is alleged he unlawfully converted to his own use, and which he refuses to account and to pay over to the appellant.

It appears, that Mr. Stouffer, a resident of Washington County, died intestate, on or about the 7th day of November, 1908, possessed of an estate of real and personal property

Md.]

Opinion of the Court.

worth over sixty thousand dollars. He never married and left surviving him, one brother, three sisters, and a number of nephews and nieces children of deceased brothers and sisters, as his only heirs at law, and distributees.

The bill avers that on the 24th of May, 1907, the appellee, a nephew of the decedent, was duly appointed an attorney-in-fact of Hiram D. Stouffer by an instrument in writing and the power of attorney was recorded among the Land Records of Washington County, and that at the time of the appointment, Mr. Stouffer, had on deposit in the Hagerstown Bank of Washington County, the sum of four thousand six hundred and sixty-seven dollars in cash, due and payable on demand.

The bill then avers that the appellee while acting as attorney-in-fact of Hiram D. Stouffer contriving and conspiring with a certain Mary Stouffer and a certain Barbara Stouffer, his sisters, with the design and intent to defraud did unlawfully procure his signature to a certain check bearing date of June 10th, 1907, and payable to John B. Wolfkill or order at the Hagerstown Bank, of Hagerstown, Maryland, for the sum of four thousand six hundred and sixty-seven dollars and seven cents.

It then alleges that Hiram D. Stouffer was advanced in age, being over seventy years old and was not only infirm in body, but was for a long time before his death and at the time the check was signed enfeebled and impaired in mind to such an extent as to render him unfit for the transaction of any business and wholly incapable of making a valid deed or contract; that he was particularly susceptible to influences surrounding him and residing with Mary Stouffer, and Barbara Stouffer, with Wolfkill frequently in attendance, his feebleness and incapacity were taken advantage of by them and he was induced, influenced and persuaded to sign the check which was for all monies which he had on deposit at the bank and that the check was drawn up by Wolfkill. That he was helpless and under the control and re-

straint of Wolfkill, Mary Stouffer and Barbara Stouffer, and at various times was subject to cruel treatment at their hands.

It further avers, that the appellee, after procuring the signature of the decedent to the check, and while acting as attorney-in-fact, on the 13th of June, 1907, with the design and intent to defraud did unlawfully withdraw from the bank, the sum of \$4,667.07, and did unlawfully transfer and convert the same to his own use and refuses to account for and pay over the same to the appellant, the representative of the personal estate of the deceased.

The prayer of the bill is, that the appellee, be ordered and directed to make an accounting for the fund here in dispute and the accrued interest thereon which he unlawfully withdrew from the bank, and unlawfully transferred and converted to his own use.

The defendant below, the appellee here, admits the allegations set out in the first, second, third, fourth, eighth, ninth and tenth paragraphs of the amended bill but denies that while acting as attorney-in-fact, he contrived and conspired with Mary and Barbara Stouffer, sisters of the appellant's intestate, as charged, to defraud him. He also denies that he unlawfully procured his signature to the check, the proceeds of which is here in dispute, but on the contrary asserts, that the check was a voluntary gift to him from the decedent, absolutely free from the influence of any design or intent exercised either by himself, or in conjunction with the sisters of the deceased, to defraud and that the check was signed by the deceased, in his lifetime, of his own free will. He admits the collection of the check from the bank, but denies he procured the signature to the check and also denies that the money was withdrawn from the bank with the design and intent to defraud, or that he unlawfully converted and transferred it to his own use, the proceeds of the check.

The theory of the defendant's case, that is the giving and cashing of the check, is fully set out in detail in the sixth

Md.]

Opinion of the Court.

paragraph of the defendant's answer, which we will here insert. He avers, that the two sisters of the deceased were never married, and they made their home with their brother for many years; that about the year 1881, when the respondent was about seven years of age, Hiram D. Stouffer, who was the brother of this respondent's mother, requested the parents of this respondent the privilege of taking this respondent into his home and there care for him, and agreed that this respondent should be well paid for such services as he would render to his said uncle; that thereupon this respondent did go to live with his uncle, and did render many and valuable services to him from that time until the day of his death, on or about the 7th day of November, A. D. 1908, a period of more than 27 years.

That after his uncle's death he filed with the Orphans' Court for Washington County an account for the services; that the account was passed and docketed by the Court, and that amongst other credits allowed on said account is the said sum of \$4,667.07, the proceeds of the check.

That subsequently thereto this respondent brought suit in the Circuit Court for Washington County against Charles E. S. Stouffer, administrator of Hiram D. Stouffer, deceased (the complainant in this cause), on the account, and filed in said suit a bill of particulars, and the sum of \$4,667.07 is allowed as a credit in said bill of particulars.

That Charles E. S. Stouffer, administrator, filed the general issue pleas and pleas of limitation to the action, whereupon issue was joined and the cause came on for trial and was submitted to the Court and a jury for trial in the Circuit Court for Washington County. Testimony was offered in behalf of both the plaintiff and defendant in the cause and the circumstances surrounding the drawing and delivering of the check for \$4,667.07 were inquired into; the sisters, Mary Stouffer and Barbara Stouffer, who were present at the time the check was drawn and delivered were both on the witness stand and were examined in chief and cross-

examined in regard to the check, and at the conclusion of the testimony the Court instructed the jury by granting but one prayer in the cause, a certified copy of which prayer is herewith filed as part hereof; after argument by attorneys for plaintiff and defendant, the jury rendered a verdict for the plaintiff for the sum of \$1,750.00. Upon this verdict a judgment was subsequently entered by the Court and has since been paid and satisfied by the defendant in that case, who is now the plaintiff in this cause.

This respondent further shows that prior to the time when Hiram D. Stouffer drew the check he had frequently expressed his intention and desire to give a large portion of his property to this respondent in compensation for the services rendered him; that on the day before the check was drawn he examined his bank book to ascertain the amount of the balance on deposit to his credit, and also requested his sister, Barbara Stouffer, to make a like examination, and when he had ascertained the full amount thereof he sent for this respondent, who came to him, and then, in the presence of his two sisters, gave to this respondent the said check and, being sick at the time, stated in substance as he delivered the check, that he would give him that, or he (meaning this respondent), might not get anything; that the act was a free and voluntary act done without the solicitation or influence of this respondent, and was the consummation, in part at least, of a long-cherished desire and frequently expressed intention to reward this respondent for the services which had so long and faithfully been rendered by him, whom he had taken into his home when of tender years, and upon whom, in the absence of children of his own, he had bestowed his affection.

It will thus be seen what are the contentions of the respective parties upon the record, and what are the questions presented here for review. Concisely stated, the appellant alleges, first, the want of sanity and mental capacity on the part of the alleged donor, at the time of the giving of the

Md.]

Opinion of the Court.

check and that he at the time was incapable of making a valid gift of the check to the donee; second, deception, fraud, imposition and undue influence practiced upon him, by the appellee, and by the two aunts, sisters of the decedent, and thirdly, the confidential relations of the parties were such, as to admit of improper dominion and undue influence, and there is no evidence that the decedent had proper and independent advice, in making the gift of the check.

The appellee also relies and insists upon the plea of *res adjudicata*, because the matters in dispute were settled and adjudicated in the law case between the same parties in the Circuit Court for Washington County, where the check, and the proceeds thereof, were determined to be the property of the appellee, and a credit given the appellant, in the trial of that case, and secondly, that the giving and receiving of the check was a free, voluntary and unbiased act, of the decedent, and constituted a valid and *bona fide* gift, *inter vivos*, consequently, the proceeds of the check is his absolute property.

It is clear, we think, from an examination of the evidence set out in the record, of this case, that the appellant has entirely failed to sustain the allegations of his bill, and is not entitled to the relief sought thereby.

In the first place, if the validity of the check and its proceeds were fully and finally gone into and determined in the trial and judgment of the law suit, then, that is the end of the matter, and the appellant is precluded from raising that question in this suit, or to open the same subject of litigation between the same parties, in another suit. The law is well settled that the plea of *res adjudicata* applies, except in special cases not only to the points upon which the Court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, even using reasonable diligence, might have brought forward at the time. *Henderson v. Henderson*, 3 Hare, 115; *Marine*

Bank v. Heller, 94 Md. 216; *Rogers, Brown & Co. v. Nat. Bank*, 93 Md. 613; *Beloit v. Morgan*, 7 Wallace, 619; *Trayhern v. Colburn*, 66 Md. 278.

In *Aurora v. West*, 7 Wallace, 102, it was said, where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam* and former judgment in such case, is conclusive between the parties.

Now, it cannot be doubted that the check was allowed as a credit upon the account, in the suit of the appellee against the appellant, in the law case, for services rendered him in his lifetime. JUDGE KEEDY, who sat in the law case, and also in this case, says in his very full and carefully prepared opinion set out in the record, that there was on December 7th, a bill of particulars filed in the case, giving a credit thereon of the sum of \$4,667.07 does not seem to admit of any doubt; that the check was in evidence before the jury and that the Court's instruction to the jury refers to the check and says "given in evidence." In the law case the judgment was for the appellee for the sum of \$1,750.00 on an account of \$8,900.83 and it appears from the bill of particulars filed in the case, that a credit of "1907,—June by check, \$4,667.07," was entered thereon.

It seems, therefore, clear to us, to now allow the appellants to recover the proceeds of this check would be to reopen the controversy in the law case without an appeal from the judgment entered therein, and to now hold that the credit was not properly allowed.

This would be in violation of all the established precedents controlling like cases and destroy the conclusiveness of judgments and decrees between the parties. In *Albert v. Hamilton*, 76 Md. 309, it was said: It is not in the power of a party to split up a litigation into portions and bring

Md.]

Opinion of the Court.

them before a Court of Justice for adjudication in successive suits. *State v. Brown*, 64 Md. 204.

But assuming that the verdict and judgment in the case at law is not conclusive on this appeal and cannot operate in the nature of an estoppel in this case, still we entertain no doubt as to the proper conclusion on its merits.

The proof shows that Mr. Stouffer was capable and competent to understand and to know the nature of his act when he signed the check. While his health was impaired Dr. J. McPherson Scott, his family physician, testified that he visited him on the 5th, 9th and 12th of June, 1907, and at that time he was capable of executing a valid deed or contract. The testimony of the two sisters, Barbara E. and Mary L. Stouffer, was to the same effect, and they were positive and explicit that the decedent was capable of giving the check and knew what he was doing. They were both witnesses to the transaction and state in detail the reasons given by him for the giving of the check. They also testified that he was a man of strong will power and not easily influenced.

In *Cherbonnier v. Evitts*, 56 Md. 276, it is said: In determining whether an owner in disposing of his property by way of gift has done so with a sound mind and in the exercise of his own deliberate will, not only his condition at the time of the execution of the instrument and the circumstances of the act of the execution itself are to be considered, but also his previous life, habits and relation to others, so as to ascertain the natural and probable objects of his bounty, and especially to discover his settled purpose, if any he had, in regard to the disposal of his estate.

There is no legal and sufficient evidence in the record to show that deception, imposition or fraud were practiced by anyone to induce the decedent to make the gift of the check, but on the contrary the proof is clear and full to the effect that the gift was the free, voluntary, unbiased and deliberate act of the donor and that the transaction was a righteous one.

The test in this class of cases being that he (the donor) knew that the gift itself operated to divest him of all title to the property and vest it in the donee. *Zimmerman v. Bitner*, 79 Md. 125; 1 *Story's Eq. Jur.* 323.

LORD ROMILLY, in *Cook v. Lamotte*, 15 Beav. 239, declared the rule to be, where those relations exist by means of which a person is able to exercise a dominion over another, the Court will annul the transaction under which a person possessing that power takes a benefit unless he can show that the transaction was a righteous one. *Whitridge v. Whitridge*, 76 Md. 73; *Davis v. Denny*, 94 Md. 392; *Brown v. Ward*, 53 Md. 387.

We think the burden of proof cast upon the appellee by the rule of law established by the foregoing cases has been fully met by the evidence in this case.

The appellee's testimony and the averments of the answer are corroborated and supported in a most satisfactory manner by the testimony of Barbara E. and Mary Stouffer, witnesses who were testifying against their interest, because they were heirs at law of the intestate.

Besides this, the declaration of the intestate at the time he gave the check to the appellee that "if I don't give you that you might not get anything," or "if he didn't give him that maybe he wouldn't get nothing," shows his intention of providing for him in a financial way and the want of imposition or coercion on the part of the appellee.

The relation and devotion of the parties for over twenty-eight years shed considerable light upon the transaction and, together with all the surrounding circumstances of the case, should make a Court hesitate long before granting the relief sought by the bill in this case, and annul a transaction satisfactorily appearing to be the uninfluenced, deliberate and intelligent act of the donor.

In *Hunter v. Atkins*, 3 Myle & Keene, 113, it is said, if on such grounds a contract so prepared and executed is to be set aside, few, assuredly, of the acts of men dealing with

Md.]

Opinion of the Court.

their own affairs are safe, and the law which enables all who are of sound mind to dispose of their property no longer exists. And in *Zimmerman v. Frushour*, 108 Md. 115, it is said: No law that is tolerable among civilized men can ever forbid such a transaction, a gift from a client to a valued attorney, provided he be of sound mind and there is nothing to show that deception was practiced or that the attorney availed himself of his situation to withhold knowledge or exercise any influence advantageous to himself.

But this is not all. It appears that after the trial of the law suit and after the proceedings in this case had been instituted all of the persons (7) interested in the estate of Hiram D. Stouffer, except the appellant, who represents a one-seventh interest therein, and one Clinton Stouffer, who is entitled to a one-fourteenth interest, petitioned the Orphans' Court of Washington County to rescind an order previously passed to prosecute the collection of the claim against the appellee on account of the check here in dispute. The tenth paragraph of the petition is in these words: "Your petitioners show that they are fully satisfied and convinced of the *bona fides* of John B. Wolfkill in taking and receiving the check hereinbefore mentioned and of the free, unconstrained and deliberate intention of Hiram D. Stouffer to give to John B. Wolfkill the check and the proceeds thereof as his absolute property, and they further show that the equity cause has been filed against John B. Wolfkill for the purpose of vexing and harassing him, and that it can result in no benefit to the estate of Hiram D. Stouffer, deceased, but will serve only to make additional costs and counsel fees to be paid out of the estate, and is an attempt to execute threats heretofore made by Charles E. S. Stouffer, administrator as aforesaid, to spend the entire personal estate of his decedent in litigation unless this honorable Court grants the relief herein prayed."

And in the third paragraph it is stated that at the trial of the suit at law all the matters in dispute between Charles

E. S. Stouffer, administrator as aforesaid, and John B. Wolfkill were put in issue and the proceeds of the check, to wit, the sum of \$4,667.07, were allowed as a credit upon the account sued on.

As to the rulings upon the exceptions to the testimony we find no such error as prejudiced the appellant's case. Under the facts and circumstances of the case the testimony was relevant and admissible.

It follows from what has been said that we regard the proof in this case as fully measuring up to the requirements of the law to constitute a valid gift *inter vivos* between the appellant's intestate and the appellee, and without further prolonging this opinion the decree of the Circuit Court of Washington County holding that the appellant is not entitled to the relief sought and dismissing his bill will be affirmed.

Decree affirmed and bill dismissed, with costs to the appellee.

Md.]

Syllabus.

THE FIRST NATIONAL BANK OF HAVRE DE
GRACE *vs.* SCOTT A. WHITE.

*Mechanics' Lien—Contract for Work on a Building Held to
Have Been Made With the Owner of the Building
and Not With the General Contractor.*

Upon a bill to enforce a mechanics' lien against a building for putting on it a tile roof, the claimant alleged that the owner and architect had ordered the work from him and promised to pay for it, while the owner of the building alleged that it had been ordered by the contractor, and that the contract for the roof had been made by the lien claimant with the contractor, and that since the claimant had not given to the owner the notice of his intention to claim the lien required by statute, the same was not enforceable against the building. *Held*, upon an examination of the evidence, that the claimant had made the contract for doing the work directly with the owner and not with the general contractor, and that consequently his claim is enforceable.

Decided January 11th, 1911.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

S. A. Williams and *P. H. Close*, for the appellant.

William H. Harlan, for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellee in this case was in the years 1905 and 1906 a resident of Pittsburg, Pa., and was, as he expresses it, in the business of "roofing and terra cotta work." Between the 8th day of November, 1905, and the 18th day of January, 1906, he furnished labor and material in the construction of a bank building at that time being erected upon a lot of land in Havre de Grace, Harford County, Md., owned by the appellant; for which labor and materials so furnished he was to be paid the sum of \$727.00. It not being paid, he, on the 13th day of July, 1906, filed a mechanics' lien therefor, with interest thereon from the 18th day of January, 1906, against the bank building and the lot on which the same was erected. Others who had also furnished labor and material in the construction of this building, likewise filed mechanics' liens. Among them was one Abram M. Zimmers, who, on the 15th day of October, 1906, filed his bill of complaint asking that a decree be passed for the sale of the property, against which such liens had been filed, and that the proceeds therefrom be distributed among the lienors, as far as they were entitled thereto.

In the bill so filed, in which the appellant and the lienors, including the appellee, were made parties defendant thereto, he alleged, among other things, that the John A. Sheridan Company was the contractor and builder of the said bank building, and that the appellant was the owner of said building and the grounds upon which it was erected. It also alleged the filing of the liens of the appellee and others against said property.

The appellant answered admitting that it was the owner of the building and the grounds upon which it was erected, and in respect to the appellee's claim admitted that it had been filed, as stated, but denied that his claim was due as alleged, or that it was a valid and subsisting lien against the property of the appellant.

Md.]

Opinion of the Court.

The appellee thereafter filed his answer to the bill, alleging, among other things, that the contract for the furnishing of the labor and materials, mentioned in his lien, was made with the appellant, and that he had at the time "no knowledge of any general contractor on the work and did not deal with any general contractor, but dealt directly with the said bank through its agents," and that not until a long while after the contract had been made was he notified that the John A. Sheridan Company was the contractor and builder of said bank building. In his answer he also alleges that the material was furnished and the work done as stated in the lien, and that the whole amount to be paid therefor, together with the interest thereon, was still owing to him.

Evidence was taken both for and against the recognition of this claim as a lien upon the property of the appellant mentioned therein, and upon submission of this evidence to the Court below the lien was sustained. It is from this order sustaining the lien that this appeal is taken.

The sole question in this case is, with whom was the contract made and to whom was credit given by the appellee for the materials furnished and work done by him in the construction of the building; that is to say, was the contract made with and credit given to the appellant, the owner of the building and the grounds upon which it was erected, or was the contract made with and credit given to the contractor and builder thereof, the John A. Sheridan Company? If it should be found that the contract was made with and credit given to the contractor and not with and to the owner of the building, then the lien is defective, because of the want of the notice required under the statute to be given by the appellee to the owner of the building and the grounds upon which it was erected, of his intention to claim a lien on the property for the work and materials furnished. If, however, it should be found that the contract was made with and credit given to the owner of the building, the appellant, then the lien should be sustained.

Opinion of the Court.

[114]

The appellee testified that the first information he had as to the erection of this bank was communicated to him by a letter from R. T. Cropper, of Philadelphia, agent of the Akron Roofing Tile Company, of which company he was also a representative, though in a different territory. In this letter, dated October 25th, he was requested to make an estimate on the tile roofing for this building. This he did, and a short while thereafter forwarded the same both by wire and mail, and in reply thereto was notified by Cropper that the contract had been awarded to him and for him to proceed with the work. Upon receipt of this notice the order was at once sent to the factory. He further stated that after this he was in Philadelphia and there he met Mr. Plack, architect, and Mr. Vanneman, cashier of the appellant bank. The exact date of this visit he could not recall, but it will be seen by his letter to the John A. Sheridan Company of November 11th, 1905, offered in evidence, and the letter of Cropper to White, dated November 13th, 1905, and by other evidence appearing in the record, that the date of his visit to Philadelphia on the occasion referred to was Tuesday, November 7th, 1905. He testified that upon this occasion, after discussing other questions in relation to the shipment of tile, etc., "Mr. Plack said he wanted us to make a contract with and send the bill to the John A. Sheridan Company. They stated their reason for this was they wanted to keep their accounts here with Mr. Sheridan. From the fact that Mr. Cropper told me that he had bid with one or two other metal roofers I supposed that the John A. Sheridan Company was a metal roofer. I stated that I was willing to make a contract with or send the bill to anyone they chose if they would agree to be responsible for the payment of the money to us. Mr. Plack turned to Mr. Vanneman and put the question to him and Mr. Vanneman consented to be responsible for the payment of the money. I did not know until quite a time after we had finished our work that the John A. Sheridan Company was a general contractor.

Md.]

Opinion of the Court.

So that my position in this case was that we were dealing entirely with the bank through Mr. Plack and Mr. Vanneman, and that we would be paid by them; that they would hold the money back from the tin roofer, as I thought at the time. The fact of our sending the bid to Sheridan for him to accept and sending the bill to Sheridan was to straighten out the account between the owner and Sheridan."

Mr. R. T. Cropper, of Philadelphia, testified that his business was that of "roofing tile and slate," and stated that in the latter part of 1905 he was at the office of Mr. Wm. L. Plack, architect, in the City of Philadelphia, and was told by him that he had a roof upon which he wished to use tiling, and suggested that he submit to him samples. Later he was told the location of the building, and thinking that it was not in his territory, but in the territory of the appellee, he wrote to him the letter referred to by the appellee in his testimony. In this letter he forwarded to him the blue print that had been furnished him by the architect, with a request that he submit an estimate, which was to include the application of the tile upon the roof. This estimate was received and accepted, and he was requested by Mr. Plack to instruct Mr. White to proceed with the work. He further testified, saying: "Later I visited the office, I think possibly in response to a 'phone call, and Mr. Vanneman (the cashier of the bank) was present, when he adopted certain patterns of tile which practically had been accepted before, but with the further approval of Mr. Vanneman." That the kind and quality so selected by Mr. Vanneman were those that were placed upon the roof by Mr. White, the appellee, and that in making this contract witness dealt with no one except Mr. Plack and Mr. Vanneman; that he "never heard of the John A. Sheridan Company until the work had progressed quite some little, possibly after they had been working then a couple of days or more. The work was in progress anyway." That he never saw John A. Sheridan in his life.

William L. Plack, architect, upon being called to the stand by the appellant, testified that the appellee furnished the material and did the work mentioned in his lien. He recalled the meeting of the appellee and Mr. Vanneman, the cashier of the bank, in his office in Philadelphia; he could not say whether this meeting was before or after the work was done. When asked what was said by either the witness or Vanneman to White, or by White to either of them, he replied by saying: "To the best of my knowledge, Mr. White dropped in accidentally while Mr. Vanneman was there, and Mr. White brought up the question of who was to pay for the tiling or who was the party with whom he contracted, and I told him he was a sub-contractor under the John A. Sheridan Company of Baltimore. He then wanted to know whether the John A. Sheridan Company of Baltimore was responsible. I knew very little about them and I thought they were all right, and I said: 'Mr. Vanneman here can tell you all about them.' Mr. Vanneman then told him to the best of his knowledge the John A. Sheridan Company was entirely responsible; that they had big interests, were doing a great deal of work." Witness could not recall what was said in reply thereto by Mr. White, but "he seemed to be satisfied with Mr. Vanneman's explanation of the situation and I heard nothing more about it. The material was delivered." That part of the testimony of White where he said "I stated I was willing to make a contract with or send a bill to anyone they chose if they would agree to be responsible for the payment of the money to us," was repeated to witness, and he was asked if anything of the kind was said in the interview, to which he replied: "I don't know that they were the *exact words* that Mr. Vanneman used, but I felt at the time and I think that Scott White felt that the idea to be conveyed was that he should be protected in the payment of his bill. The whole gist of the conversation was Mr. Vanneman acting in the capacity of cashier of the bank and I as archi-

Md.]

Opinion of the Court.

tect of the bank, without detailing any personal responsibilities, talking in a general way upon the subject." Upon cross-examination, when asked: "Who solicited the bid from White for the roofing?" he said: "I went to Mr. Cropper's place, at Builders' Exchange on S. 7th St., was very favorably impressed with the material he had on exhibition, and when Mr. Vanneman next came to the city I took him down and we looked them over. He was also favorably impressed and we made a selection and notified Sheridan." That after the selection was made by witness and Vanneman and notice thereof given to Sheridan he, Sheridan, gave the order to White for the roofing. He was then asked: "Then Mr. White was in error when he stated that you awarded him the contract on the estimate sent by him to Cropper and by Cropper handed to you?" A. If I had authority from Sheridan I may have ordered it, but I do not recall; if I did order it it was as Sheridan's agent. Q. Did you order it as Sheridan's agent? A. I can't recall now, sir; I can't tell you, but if I did it was by letter authorizing me to do so. Q. But do you claim to have disclosed to Mr. White or Mr. Cropper that you were ordering this stuff as the agent of the John A. Sheridan Company? A. Yes; because I told them they were sub-contractors under Sheridan; that is implied. Q. But the interview between you, Mr. White and Mr. Vanneman took place after the contract had been awarded? A. Evidently. Q. Now, who awarded the contract? A. The John A. Sheridan Company awarded the contract."

Mr. Vanneman, the cashier of the bank, was then placed upon the stand, and testified that he was in Mr. Plack's office one day and was just going out as Mr. White came in the door. He was then asked: "Please state your recollection of what was said by each one of you at that interview? A. I have very little recollection of much being said, except Mr. Plack's hurrying him up and I forget what reason he gave for the delay; there was some delay at the factory, though. I think; as far as any question from him as to who would be

responsible, I do not think any such question was asked. Q. Was anything said there about the responsibility of John A. Sheridan Company? A. They probably asked me as to whether the John A. Sheridan Company was responsible; I told them I thought they were; they were putting up large buildings in Baltimore and I had no idea but what they were in first-class condition." He was then asked if it were true, as testified to by Mr. White, that he had stated that he was willing to make a contract with or send the bill to anyone they chose if they would agree to be responsible for the payment to him of the money; to which he replied that it was not true; that he never assumed on his own part or on the part of the bank any responsibility for the payment of the debt. He then testified that the John A. Sheridan Company made the contract; that he had nothing to do with it, and then further said: "I went with Mr. Plack to Mr. Cropper's office at his suggestion to see the different styles of tile and what they thought would be best for that roof. We saw the kind we thought would look best and Mr. Plack approved of it as the architect, and I told Mr. Cropper right there that we had nothing to do with the ordering of it; that the order had to come from the Sheridan Company." He further testified that he was a stockholder in the John A. Sheridan Company to the extent of one thousand dollars, the entire capital stock being twenty-five thousand dollars.

There are in the record as evidence a number of letters and telegrams from and to the various parties connected with this transaction. We find first a letter of the date of October 25th, from Cropper to White, in which he said that he was, under separate cover, sending him plans upon which he wished him to make an estimate for tile roofing for the bank building at Havre de Grace, Md. In this letter he said "the architect had his client here yesterday and I told him that I would have him a bid from a man who could lay a job in a workmanlike manner and that he would not have a leaky roof." This letter does not disclose the name of the

Md.]

Opinion of the Court.

client referred to, but it could not have been the John A. Sheridan Company, for Cropper in his testimony has said that he "never heard of the John A. Sheridan Company until the work had progressed some little, possibly after they had been working then a couple of days or more," and that he never saw John A. Sheridan in his life. Therefore, we can assume that the client referred to must have been someone connected with the appellant. In this letter he directed White to send his bid to W. L. Plack, architect, 1208 Chestnut street, Philadelphia. A letter from Cropper to White, dated October 30th, shows that he had not at that time heard from him, as in this letter the writer said: "I am awaiting the arrival of blue prints and your bid on the Havre de Grace bank." But by letter of November 11th, 1905, from White to the Sheridan Company, it is shown that the bid or estimate was forwarded by White to Architect Plack by letter of October 31st, for in the letter of that date he refers to his bid sent to Plack, the architect.

In a letter from the John A. Sheridan Company dated November 8th, the writer said: "Your letter of October 31st received and contents noted for the roof tile at the Havre de Grace bank. *This was ordered by the architect* and I hereby accept the same for \$727, all complete down to the gutter, as per plans and specifications drawn by Mr. W. L. Plack." By letter of the same date to the Sheridan Company White acknowledges the receipt of the aforesaid letter of the Sheridan Company accepting his bid, and states in this letter, "The materials (tarred felt, tin and nails) have already been shipped, the tile will follow shortly," etc.

A letter from White to the Sheridan Company, dated November 11th, aids in establishing the date of the meeting of the appellee and Vanneman at the office of Plack in Philadelphia as being on November 7th, 1905, for in it he says: "I saw Mr. Plack in Philadelphia on last Tuesday (the 11th of November, 1905, came on Saturday, consequently the preceding Tuesday was the 7th), and it will be recalled that

in the evidence there is no testimony that the appellee met Mr. Plack in Philadelphia in relation to this matter on any other occasion than the one referred to, in which the alleged conversation took place. In fixing this time we are also somewhat aided by the letter from Cropper to White, dated November 13th, in which he says: "Proceed at once with the architect's interpretation on Tuesday last." It was, therefore, on the day following the meeting in Philadelphia that the John A. Sheridan Company in its letter of November 8th, accepted the bid of the appellee to furnish material and do the work on the building for \$727, and at a time after the order had been given and some of the materials furnished thereon. Therefore, it is not an unreasonable inference that this letter was written by the Sheridan Company when informed by either Plack or Vanneman of the conversation between the appellee and Vanneman on the previous day, in which they had suggested that the appellee should "make a contract with and send the bill to the John A. Sheridan Company," and was done in part execution of the plan so suggested.

It seems that in the letter from the John A. Sheridan Company to White, dated November 8th, the expression therein used, "all complete down to the gutter, as per plans and specifications drawn by Mr. Plack," gave rise to some disagreement or misunderstanding, for in the letter from White to the Sheridan Company dated November 9th, 1905, the writer refers to this expression and says: "Please note that our estimate does NOT include any metal work, valleys," etc. To this letter the Sheridan Company replied on November 10th, saying therein, "Mr. Plack and Mr. Vanneman told me that *they were going to arrange with you to put this roof on for the same price as I had for my man, everything included except skylight, down to gutter.*"

The language in this letter italicised goes far to sustain the contention of the appellee and to show that the position assumed by Plack and Vanneman in relation to the procur-

Md.]

Opinion of the Court.

ing of this estimate and the furnishing of the labor and material, was independent of the alleged contractor.

It is true that in two letters from White to the Sheridan Company, one dated March 8th, 1906, and the other dated April 8th, 1906, the Sheridan Company is asked to pay this claim, but this fact in itself does not show that the contract was made with the contractor and credit given to him, but is only a circumstance to be submitted with all the other evidence in the case. *Elder v. Warfield*, 7 H. & J. 391; *Meyer and Ewaldt v. Grafflin*, 31 Md. 357.

In the last letter of the correspondence between White and Vanneman—a letter from Vanneman to White—dated July 15th, 1906, the writer acknowledges White's favor of the 8th and said he had been endeavoring to have an interview with Sheridan in relation to the appellee's account, and thereafter in his letter said: "I presume you are aware that the John A. Sheridan Company has made an assignment and I do not know as yet what the outcome will be, but I want very much to see your account settled. I would suggest that you write at once to Mr. S. A. Williams, attorney at law, Harford Co., Md., to take steps to lay a lien on our building on your claim. When this is done legally to protect us, you can assign the claim to us and we will pay the bill." At this date it was too late to give the notice required by the statute to be given by the appellee to the owner of the building if the contractor was to be treated as the party with whom the contract was made and to whom credit was given. From this letter it can be reasonably inferred that at the time it was written there had been no settlement between the bank and the contractor, for they promised to pay the bill when the claim was filed legally to protect them, which promise it is not probable they would have made had they fully settled with the contractor. As suggested by Mr. Vanneman, the appellee filed his lien on the 13th day of July, 1906, less than thirty days after receipt of this letter.

As the question in this case is largely one of fact, we have set out very fully the evidence appearing in the record, and while there is a conflict therein, we think the weight of it sustains the contention of the appellee that the contract for the furnishing of this labor and material was made by the appellee with the appellant, the owner of the building, for which the work and materials were furnished in its construction, and that the credit was given originally to the bank and not to the contractor. In reaching this conclusion we regard the acceptance by the contractor of the appellee's bid or estimate, as shown by his letter of November 8th, under the circumstances of the case, as more of a confirmation by him, as contractor, of the contract previously made with the appellant, which acceptance was suggested by the appellant and was agreed upon and consented to by the appellee for the purposes stated in the testimony and as a matter of favor and convenience to the appellant. We will therefore affirm the order of the learned Court below.

Order affirmed, with costs to the appellee.

Md.]

Syllabus.

EX PARTE JOHN A. HUMBIRD ET AL.

*Increase in Value of Property Held in Trust for Life Tenant
With Remainder Over—Extra Dividend on Shares of
Stock Owned by Life Tenant Derived from Sale of
Property of Corporation—What is Income as
Between Life Tenant and Remainderman—
Construction of Will Creating Trust
Estate for Life.*

When a trustee is directed to pay the "interest or earnings" of the estate to a life tenant with remainder over of the principal, the life tenant is entitled only to the income, and an enhancement in the value of the estate is not a part of the interest or earnings.

The direction in a will that a part of the testator's estate, amounting to a designated sum, shall be set aside and held in trust for life tenants, does not mean that the life tenants are entitled to any increase subsequently accruing in the value of the trust estate over and above the designated amount.

When a life tenant is entitled to the interest and income on shares of stock in a corporation, and that corporation sells a part of the property in which its capital is invested and distributes the proceeds of the sale as a cash dividend, such dividend is a part of the corpus of the trust estate and is not income to which the life tenant is entitled.

The exception to this rule is confined to cases in which the earnings of a corporation involve the conversion of its capital, as when the chief business of a corporation is to buy and sell land in which its capital is invested.

A testator directed that \$700,000 of his estate should be held by trustees who should invest and reinvest the same and pay the interest or earnings thereof to his seven children for life with remainder to their respective heirs. One part of the property constituting the trust estate was an undivided interest in a tract of timber land in British Columbia, which

cost the testator and the trustees about \$30,000. Afterwards this interest in the land was sold for \$85,000. *Held*, that this increase in the value of the trust estate belongs to the principal, and not to the life tenant.

Another investment held by the said trustees was a number of shares of stock in a Canadian Lumber Company, upon which the payments made by the testator and the trustees after his death out of the corpus, amounted to \$196,000. The Lumber Company sold 52,000 acres of its land, which it had acquired as part of a larger tract made as an investment of its capital. The amount paid as a cash dividend to the trustees arising from this sale was \$676,000. The company had the power under its charter to buy and sell land, but its business had been confined to operating saw mills and the lumber business generally, and it had not engaged in buying and selling land. After the sale of the 52,000 acres, the Lumber Company retained land amounting in value to five times its capital stock. *Held*, that this cash dividend so paid to the trustees is not income or earnings of the investment, but belongs to the corpus of the estate as a result of an increase in its value.

Decided January 11th, 1911.

Appeal from the Circuit Court for Allegany County (Boyd, C. J.).

The cause was argued before BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON and URNER, JJ.

Ferdinand Williams and *George Weems Williams*, for the appellants.

David A. Reed, *Albert A. Doub* and *D. Lindley Sloan* (with whom was *Ralph Longenecker* on the brief), for the appellees.

Benjamin A. Richmond, for the trustees.

Md.]

Opinion of the Court.

URNER, J., delivered the opinion of the Court.

The questions presented on this appeal arise from conflicting, though amicable contentions, between life beneficiaries and remaindermen under a testamentary trust, as to the disposition of funds which the former assert to be income, and the latter claim to be corpus of the estate.

The facts upon which these questions are to be determined appear in an agreed statement contained in the record, and are in part as follows:

Jacob Humbird, of Allegany County, died on March 26th. 1894, seized and possessed of a large real and personal estate, and leaving a will by which, after certain dispositions in favor of his widow, he gave all the residue of his estate to his seven children equally, to be held, however, by his sons, John A. and David Humbird, and his son-in-law J. B. G. Roberts, in trust for the use and benefit of all the children. The trustees were directed to "manage, control, invest and reinvest said property or estate in their trust in a careful and prudent manner, and pay or distribute annually to each of said children the interest or earnings of the estate so devised." It was provided that the trust should, "last during the lifetime of each of said children, and after their respective deaths said bequests to go to their heirs." By a codicil to the will the testator, after directing that there be invested in "good and safe security" seven hundred thousand dollars, authorized the reduction of the trust estate to that amount by permitting the trustees to divide the balance of the estate, "equally with the seven heirs."

The executors of the will, who were the same persons named as the trustees, with the consent of all the children of the testator, transferred to the trustees certain real and personal estate amounting to slightly more than \$700,000, as constituting the corpus of the trust.

Among the original assets of the trust estate was an undivided one-sixth equitable interest in a tract of 20,000 acres of timber land in British Columbia, known as the Kowitchen

and Kokosala lands upon the purchase of which the testator had paid \$11,884.58. The trustees made further payments out of the corpus, upon the investment, increasing its total to \$29,039.35. No income was derived from this property. The undivided interest held by the trustees was sold in July, 1910, for \$85,549.69. One of the questions we are to consider is whether the whole of the proceeds belongs to the corpus of the trust, or whether the difference between the purchase and selling prices of the land should be applied as income.

Another of the investments which came into the hands of the trustees consisted of 2450 shares of the capital stock of the Victoria Lumber and Manufacturing Company, a Canadian corporation, upon which the testator had paid \$111,149.91, the par value being \$245,000. The trustees have continued to hold this stock, and have made further payments upon it, amounting, with those made by the testator, to a total of \$195,999.91. All of the payments by the trustees were from funds belonging to the corpus of the trust estate. Prior to 1910 the company paid only three dividends of three per cent. each on its capital stock. In February, 1910, a dividend of \$15.00 per share was declared, and this was followed in July by a further dividend of \$276.00 per share. These dividends were paid out of funds realized from the sale of 52,000 acres of the companys' timber lands. The total price was \$3,500,000 of which \$250,000 was paid in February and the remainder in July, 1910. A portion of the first payment was appropriated to the \$15.00 dividend, while the later and larger one was declared out of the balance of the purchase money.

The smaller dividend, amounting to \$36,750.00 on the stock of the trust, was distributed by the trustees to the life beneficiaries, and this disposition of the fund it is agreed by all the parties shall be treated as final, and shall not affect the question now presented as to the subsequent dividend of \$276.00 per share. The amount of that dividend on the

Md.]

Opinion of the Court.

shares of the trust is \$676,000, and is now in the hands of the trustees. It is claimed by the life tenants as income of the trust estate, while the remaindermen assert that it should be held and invested as corpus.

In order that the questions we have indicated might be judicially determined, the trustees filed a petition for that purpose in the equity proceeding in which the jurisdiction of the Court below had been invoked and assumed at the inception of the trust. Answers were filed by all the parties interested setting forth their respective theories, and an agreement was filed stating the facts we have mentioned, together with others to which we will presently allude. The question being thus presented, the learned judge who heard the case below decided that both the funds in controversy are properly to be regarded as corpus, and from his decree, giving effect to that conclusion, the tenants for life have appealed.

The questions to be determined, therefore, involve the application, as between the corpus and income of the trust, of: first, the increase in value realized by the sale of the land held directly by the trustees, and, secondly, the dividend declared out of the proceeds of corporate real estate in which the trustees were interested as stockholders.

Before proceeding to the discussion of these questions, we will recur to the will by which the trust was created to ascertain how far it affects their determination.

As already quoted, the provision relating to the life tenancy of the testator's children in the trust estate directs the trustees to "pay or distribute annually to each of said children the *interest or earnings* of the estate." In the codicil it is provided that, "In case of the death of son or daughter leaving no legal living heirs, the wife of the son and the husband of the daughter may, if living, receive annually one thousand dollars of the *interest* money due the son or daughter;" and, "In case of the death of son or

daughter leaving no living heirs, their estate, principal and *interest*, shall be divided equally with the grandchildren."

We have italicized the words used by the testator in describing the funds to be paid to the life tenants, because it has been argued that the terms "interest or earnings," mean more than income, and are broad enough to embrace any increase realized on the estate. If this construction could be accepted, it would readily dispose of both the points at issue in this case, as it is, of course, perfectly well settled, that in all such questions the intention of the testator, as expressed on the subject, must be strictly regarded. It seems clear to us, however, that the language of the will does not admit of the construction suggested. That the testator understood and employed the words "interest" and "earnings" as synonymous with each other, and with "income" in its ordinary sense is conclusively shown by the fact that he provided, upon the death of the children, in certain contingencies, for the further appropriation of their shares of the "interest" from the estate.

It was also suggested that the provision in the codicil authorizing the limitation of the corpus of the trust at its inception to \$700,000, and the division of the "balance of the estate" among the seven children, should be taken as indicating that the testator intended the life beneficiaries to have any increase over the original amount which might subsequently accrue. This theory is not supported by the terms of the codicil, and its application would produce results which it is not reasonable to suppose the testator ever contemplated. It would compel the trustees to convert into money, for distribution to the life tenants, every increase in value of the individual securities of the estate, whenever any enhancement over the primary appraisalment became apparent. It would have required the sale of the land and stock in question when their appreciation was first noted and when they were far short of the present values. It would involve

Md.]

Opinion of the Court.

constant change in the investments, and would seriously complicate the administration of the trust.

The testator, after providing for the investment of the estate in "good and safe security" to the amount mentioned, empowers the trustees to divide the remainder among the children. This authority having been exercised, the corpus designated is in the same position with reference to the effect of fluctuations in value as if it had been limited in the first instance to \$700,000.00.

There is nothing, therefore, in the will before us to differentiate this case from the ordinary situation existing where the life tenants are entitled simply to the income from the trust.

With this understanding of the testator's intention, we can have no difficulty in deciding the first of the questions we have stated. It has been held by this Court that an increase in a trust estate, resulting from the enhancement in value of an investment of the corpus, cannot be distributed as income. *Smith v. Hooper*, 95 Md. 16. In the case just cited, a life tenant was claiming the amount obtained from the sale of stock in excess of the sum originally invested, and it was held that the increase thus produced in the trust fund belonged to the corpus. The same principle applies to an investment in real estate under similar circumstances. The fact that, as here, the property may have been unproductive of income does not affect the ownership of its augmented value. This consideration might influence its purchase or retention as an investment but would not change from corpus to income any part of the fund realized from its sale. In this case it appears that the life tenants expressly consented to the taking over of the timber land as part of the trust estate. If it had depreciated in value, they could not have been required to bear the loss, and there is no sound principle upon which they can be awarded the increase which it has produced in the corpus.

This feature of the case was not especially emphasized by the appellants; but it has been argued with great earnestness and ability on their behalf that they are entitled as life beneficiaries of the trust to the dividend of \$676,000.00 received by the trustees upon the stock held by them in the Victoria Lumber and Manufacturing Company.

In considering this question, we are not to be governed by the mere form in which the dividend has been declared. The origin and character of the fund out of which the dividend is paid is the controlling subject of inquiry. If it is found to represent earnings, it will be held to be income; but if it is an appropriation of capital, it belongs to the corpus. This has been distinctly settled, so far as this State is concerned, by the case of *Thomas v. Gregg*, 78 Md. 545, in which the rules recognized in various jurisdictions were discussed, and the policy of our own Court adopted. In that case a dividend of earnings was declared in the form of stock, but it was held to be income regardless of its form, because of the source from which it was actually derived. It was there said to be the duty of the Court in such cases to ascertain whether the distribution was made from earnings or capital. This duty of investigating the origin of the fund was also recognized in *Quinn v. Safe Deposit Co.*, 93 Md. 285, where an extra money dividend arising from accumulated earnings was awarded to life tenants; and in *The Atlantic Coast Line Dividend cases*, 102 Md. 73, where stock dividends originating in the same way were held to be income.

In the present case the fund applied to the dividend in question, as shown by the resolution declaring it, was derived from the sale of timber lands. The property sold, comprising 52,000 acres, had been acquired, except as to a very small proportion, at the beginning of the corporate enterprise in 1890. It was included in a purchase of 88,000 acres of timber land, called the Comox lands, as an investment of capital. The charter of the corporation empowered

Md.]

Opinion of the Court.

it to "purchase, mortgage, lease, hold and acquire timber and other lands, and sell, mortgage, lease or otherwise alienate and dispose of the same, erect mills and machinery, manufacture lumber and all articles made of wood, acquire water privileges and rights of way, construct ditches, flumes, roads and tramways, purchase, sell and acquire goods and merchandise of every kind and description and generally do all such things as are conducive or incidental to the attainment of the above objects, or any of them, in the Province of British Columbia. Under this charter power the company engaged in a saw mill and lumbering business, and its operations and acquisitions of property have been confined to those purposes. In 1910 a part of the proceeds of the sale of the 52,000 acre tract was used in the purchase, from the trustees in this case and from others, of the entire title to the 20,000 acre Kowitchen and Kokosala tract, in which the company already held an undivided interest. Its other purchases of land, after the first, amounted to five or six thousand acres, which about equaled the area from which timber was cut by the company in the prosecution of its business from 1890 to 1910.

The whole of the Comox tract of 88,000 acres was bought by the company in 1890 for \$555,000. The sale of 52,000 acres of the tract in 1910 for \$3,500,000.00 left the company with ample timber land for its immediate purposes and enabled it not only to declare the extraordinary dividends referred to, but also to complete the purchase of the Kowitchen and Kokosala lands at a cost of \$456,264.84, to pay all its outstanding indebtedness, to provide for all contemplated expenditures and improvements, and to reserve \$150,000 in its treasury as a working cash balance. After the declaration and payment of the dividends the remaining property and assets of the company have a value about five times the amount paid in to the company upon its issued stock. In other words, notwithstanding the sale of nearly half the land which the company has at any time owned, and the appropria-

tion of most of the proceeds to dividends, the stock held by the trustees in this case, representing an investment of \$195,999.91, has an actual present value of approximately a million dollars. This is due almost wholly to the increase in value of the timber lands.

Upon the facts we have thus stated the inquiry we are now to make is whether a profit made by such a company as we have described out of the sale of land purchased for the purposes of the corporate enterprise is to be regarded as earnings or capital. There is no dispute as to the property having been acquired by the expenditure of capital funds, but it is insisted that in view of the nature of the business in which the company was authorized to engage, and of that which it actually conducted, the amount it gained from the sale over that originally invested should be held to be earnings. If this contention could be sustained, the dividend declared from the fund so produced would undoubtedly belong to the life tenants.

While there has been great diversity in the decisions as to other aspects of the general subject of the application of dividends as between corpus and income, yet upon the precise question we have now reached in our consideration of this case there appears to be a practical unanimity of judicial opinion.

In a note to *Holbrook v. Holbrook* (N. H.) and other cases, 12 L. R. A. (N. S.) 769, 803, containing a very able and comprehensive discussion of the whole subject, it is said:

"The Courts are substantially agreed that a dividend, so called, whatever its form, which is not declared from earnings past or current, but which represents a reduction or change of form of capital, or a mere enhancement of the value of assets representing capital from sources other than the accumulation of earnings, belongs to the corpus and not to the income. There appears, however, to be an exception—at least an apparent exception—to this principle in case of

Md.]

Opinion of the Court.

corporations whose business is such that it necessarily involves the consumption or change of form of capital, *e. g.*, a corporation whose business consists of the purchase and resale of real estate. With the exception of cases of that kind (examples of which are subsequently cited), the principle just stated operates as a practical exception to, or a limitation of, all of the rules and principles previously discussed in this note so far as they operate to award dividends to income."

The rule is thus stated in *Taylor on Private Corporations*, 4th ed., section 799: "When after the testator's death the corporation sells a portion of its property or franchises and distributes the proceeds in the shape of a cash dividend, that, too, is a part of the principal and is not income to be paid over to the life tenants."

In 2 *Clark & Marshall on Private Corporations*, 1620, it is said: "As a rule, dividends declared by a corporation out of its capital, or funds representing capital, as where it sells a portion of the property or franchises in which its capital is invested, and distributes the proceeds, are not income or profits, and do not go to the life beneficiary, but are a part of the principal which must be preserved for the remainderman."

To the same effect are 2 *Thompson on Corporations*, sec. 2220; 10 *Cyc.* 560; 16 *Cyc.* 624; 2 *Purdy's Beach on Private Corporations*, 647; *Clark on Corporations*, 2nd ed., 343; 9 *Am. and Eng. Encyc. Law*, 2nd ed., 719.

In *Heard v. Eldridge*, 109 Mass. 258, a dividend declared out of money paid to the corporation for a part of its property taken under the right of eminent domain was held to be corpus, and not income.

It was held in *Kalbach v. Clark*, 133 Iowa. 215 (12 L. R. A., N. S., 801), that a stock dividend representing the enhanced value of the company's property was corpus and belonged to the remainderman.

In *Holbrook v. Holbrook*, *supra*, it was ruled that whether the dividend was in the form of cash or stock, "if it is found, in whole or part, to represent the natural growth and increase in the value of the corporate plant and business, whether that growth and increase took place before or after the trust was created, it is also to that extent capital"; and in *Walker v. Walker*, 68 N. H. 407, it was said that money realized from a sale of corporate property, "was not either in form or in substance, a division of earnings, but a division of so much of the capital of the corporation, and as such goes to the remainderman."

Similar conclusions were reached in *Vinton's Appeal*, 99 Pa. St. 434; *Riggs v. Cragg*, 26 Hun. 89, and *Hite v. Hite*, 93 Ky. 257.

The exceptions to the general rule we have thus stated and illustrated are confined, as indicated in the note in 12 *L. R. A.* (N. S.) 769, from which we have quoted, to cases in which the earnings of the corporation necessarily involve the conversion of its capital. In *Taylor on Private Corporations*, 4th ed., 799, the exception is thus defined: "Moneys arising from the sale of corporate property and distributed as a cash dividend are income if they arise from a sale of property made by the corporation in the ordinary course of its business, when it sells only such property as its regular business is to sell." In 2 *Clark and Marshall on Private Corporations*, 1621, the general rule is said not to apply "where the nature of the corporation is such that its ordinary business is to sell property in which its capital is invested, and distribute the proceeds among its stockholders."

The cases which have been held to come within the exception clearly indicate its limitations.

In *The Matter of James*, 146 N. Y. 96, where dividends declared out of the proceeds of the sale of lands, representing investments of capital were held to be income, it was said: "These corporations were peculiar in that their only business after the expenditure of their capital in the construction of

Md.]

Opinion of the Court.

railroads, was to sell the lands received in payment and to divide the proceeds as received among their stockholders. In that respect, of course, there was a distinction between them and corporations which are engaged in ordinary business enterprises and receive returns in the way of earnings upon the invested capital. Their dividends were in truth ordinary, and not extraordinary, for the reason that they were the only ones which they could in the nature of things make."

Upon the same principle dividends were held to be paid out of earnings where the fund originated from sales of real estate by an association organized to buy lands in large tracts and make its profits out of the sale of building lots; *Thompson's Estate*, 153 Pa. 332; and where the dividends were derived from profits accruing from sales of mineral lands by a company formed solely for the purpose of dealing in real estate; *Oliver's Estate*, 136 Pa. 43; and where the company was known to earn its profits from the improvement and sale of land; *Reed v. Head*, 6 Allen, 174.

These appear to be all the cases in which the exception we are considering has been applied, and it is evident that none of them resemble in their facts the case at bar.

But it is insisted that this case is within the *principle* of the exception. It is argued, first, that while the Victoria Lumber and Manufacturing Company was not engaged solely in the purchase and sale of land, yet, inasmuch as it was authorized by its charter to buy and sell real estate, the transaction in question should be treated as having been effected in the ordinary course of the company's business. The difficulty with this argument is that it requires us to disregard the agreement of the parties as to the actual facts of the case. It is conceded in the agreed statement that the company "was organized to conduct a saw mill and lumbering business, and that its operations have been confined to those purposes;" "that it has acquired only such lands as were deemed essential to its lumbering operations;" "and that it never engaged in buying or selling land or standing timber on spec-

ulation or as a part of its business." In view of this conclusive declaration as to the real corporate purpose and practice we are not in any way aided in our decision of the question before us by a consideration of the right which the company may have possessed, but which it admittedly has never exercised, to buy and sell land and growing timber for profit.

It is further argued, however, that as the company's business involves the consumption of its timber, and as the price at which the Comox lands were sold represented in large measure their timber value, the amount gained by the sale of the lands should be considered earnings to the same extent as if the growing trees had been converted into lumber, and the dividend fund had resulted from their sale in that form. This theory does not take into consideration the broad and vital distinction between the conversion of raw material into manufactured products and the alienation of the source from which the material is supplied. The severance of trees from the lands of the company for its industrial purposes does not exhaust the value of the property or its capacity for the further production of timber. If the theory suggested could be held applicable to the present facts, it would be equally appropriate and effective in the event of the sale of *all* the company's timber lands and the distribution of the proceeds as dividends. The appreciation of the property has not been produced by the activities of the corporation. It has resulted from economic laws operating independently of the corporate agency or existence. An increase thus accruing in the company's landed capital is essentially different from the ordinary products of its industry which constitute its earnings. In our judgment, this case is clearly within the principle of the general and well-established rule we have discussed, which appropriates to the corpus a dividend paid to a trust estate out of a fund derived from the enhancement and sale of property acquired as an investment of corporate capital.

It was suggested that it is within the power of the Court to make an equitable apportionment of the proceeds of the

Md.]

Opinion of the Court.

dividend as between the life tenants and the remaindermen. If there existed any principle which would justify and guide us in pursuing such a course, we should be glad to admit both classes of claimants to participation in the fund. But there is an insurmountable obstacle to such action in the fact that the dividend, as we have found, actually belongs to the corpus, and its partial diversion to the income would work a distinct injustice to the remaindermen. If we were concerned with the application of a dividend arising from corporate earnings, and it appeared that these were accumulated in part before the creation of the trust, an apportionment as between the income and corpus would be proper and necessary. *Thomas v. Gregg, supra*. But when, as in this case, the dividend represents *capital* and belongs as a whole to the corpus of the trust, there is no reason or basis for an apportionment. The cases which have been cited in support of this suggestion involved conditions quite different from the present. In *The Matter of Rogers*, 161 N. Y. 108, a fund, distributed by a company in process of liquidation, representing the proceeds of property in which accumulated earnings had been invested, was awarded to the income of a trust, while substituted stock of a new company which had absorbed the old corporation was held to be corpus; and in the case of *Smith v. Dana*, 77 Conn. 543, while the dividend appropriated to income resulted from a sale of part of the corporate plant, this was assumed to represent an investment of earnings.

In the argument great emphasis was laid upon certain expressions in the opinion of this Court in *Smith vs. Hooper, supra*. We find nothing in the language employed by the learned Chief Judge who wrote that opinion at all inconsistent with the principle which controls the case at bar. In *Smith v. Hooper*, as we have already noted, the claim of a life tenant to the increase in a trust estate resulting from the appreciation of stock was denied. A portion of the stock was still held in the trust, and the remainder had been sold by

the trustees. The augmentation of the trust estate was not realized in the form of a dividend, and no such question as is here presented was considered. It was stated, as a reason why the contention of the life tenant could not be sustained that the corporation had not segregated from the shares any of the elements which made up their value. It was expressly said that the causes which produced the enhancement in the value of the stock were unknown, and that the cash received by the trustees for the stock disposed of could not be regarded as having arisen "from a division of earnings." The opinion does not in any way deal with the question as to the disposition of a dividend which is clearly shown to have originated in an appreciation of capital.

We fully concur in the conclusions reached by the learned judge who heard this case below, and we will affirm his decree directing that both the funds in question be held and invested as part of the corpus of the trust.

Decree affirmed, the costs to be paid out of the funds in controversy.

Md.]

Syllabus.

HARRIET E. DIAMOND vs. J. ALEXIS SHRIVER

ET AL.

*Time Not of the Essence of Contract for the Sale of Land—
Right to Rescind—Construction of Contract
by Act of the Parties.*

In a contract for the sale of land time is not generally of the essence, so as to authorize the vendor to rescind the contract for a failure of the purchaser to make payment at the time fixed.

When a contract for the sale of land provides that the balance of the purchase money shall be paid either within ninety days from date, or upon delivery of a deed conveying the land, free of encumbrances, the vendor is not authorized to rescind the contract, about a month after the expiration of the ninety days, for non-payment of the balance of the purchase money, especially where the vendor was not previously able to make a conveyance free from encumbrances, and when, after an attempted rescission, the purchaser had tendered the full amount of the purchase money.

An allegation that the execution of a contract had been obtained by means of false representations made by the purchaser, held not to be supported by the evidence.

When the language of a contract is uncertain the acts and conduct of the parties may be considered to discover the meaning of the language used, but the parties cannot testify as to their understanding or interpretation of the contract.

Decided January 12th, 1911.

Appeal from the Circuit Court for Harford County (DUNCAN, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Harry S. Carver, for the appellant, submitted the cause on his brief.

Philip H. Close (with whom was *Stevenson A. Williams* on the brief) for the appellees.

BURKE, J., delivered the opinion of the Court.

The appellant filed a bill of complaint in the Circuit Court for Harford County against the appellees for an injunction to prohibit them, their agents and servants from entering upon and taking possession of the land mentioned in the bill, and from hauling poles upon the land, and from digging up the soil and erecting poles thereon. The bill alleged her ownership of the property, and she filed therewith a certified copy of the deed under which she acquired title to the land.

The second paragraph of the bill set out the facts upon which she relied as entitling her to an injunction. It alleged "that the defendant, and certain persons, agents and employees professing to act for and on behalf of said defendants, have entered upon and are now proceeding to haul and place upon said property large poles, and are digging or proceeding to dig large holes in the ground on said premises for the purpose of erecting large poles therein, in a forcible manner, and intending to string wires on said poles, all against the earnest request and repeated protest of your oratrix, and without any legal authority or license therefor, and without first having ascertained, either by agreement with your oratrix or anyone in her behalf, or by the award of a jury, the amount of money which would be a just compensation for the use and occupation of your oratrix's said land, and without having first paid or tendered to your

Md.]

Opinion of the Court.

oratrix any just compensation therefor, and unless restrained by this honorable Court your oratrix apprehends that the said defendants, their servants, agents and employees will continue to commit trespass complained of and will erect said poles on the said property of your oratrix and string wires thereon, which will, in the future, interfere with the shade and ornamental trees of your oratrix and otherwise interfere with your oratrix in the enjoyment of said property."

The Court granted the preliminary injunction upon the bill as prayed. The respondents answered the bill, testimony was taken in open Court, and after hearing upon bill, answer, and testimony the Court passed a decree dissolving the injunction and dismissing the bill with costs to the defendants, and from that decree this appeal was taken.

The evidence shows that the Belair Electric Company has been for a number of years operating an electric plant in Harford County, and supplying electricity to its customers in Belair and adjacent territory. In the summer of 1909 it was engaged in installing another plant to be located about two and a half miles below its original plant, and it was proposed to connect the two plants by a pole line. The appellant was the owner of a small property, mentioned in the bill, located between the two plants of the defendant company, and on the route of the proposed pole line connecting them. J. Alexis Shriver, the other defendant, is the secretary and treasurer and general manager of the Belair Electric Company. It became necessary in the work of extending its business and enlarging its power for the Electric Company to erect poles and string wires thereon across the complainant's property. It determined to buy her land and with that purpose in view authorized James R. Magness to secure an option to purchase it. On July 2nd, 1909, the plaintiff and her husband executed under seal an option by which they covenanted "to grant, convey and assure to James R. Magness or his assigns in fee simple free of all incum-

brances" the land mentioned in the bill. It was provided that "this option must be exercised within thirty days by the payment of one-half of the purchase money, the balance to become due and payable within ninety days from this exercise of this option and upon the execution and delivery by the undersigned of a deed giving clear title to the same." On the next day, Maguess assigned all his interest under the option to J. Alexis Shriver in consideration of ten dollars. On the 2nd of August, 1909, this option was exercised and converted into a contract of sale by the following endorsement thereon under seal signed by the complainant and her husband: "In consideration of the payment of the sum of fifty dollars (\$50.00) the receipt of which is hereby acknowledged, the within and foregoing option is hereby exercised and converted into a sale of all the property therein described, and the balance of the purchase money thereon, to wit, the sum of four hundred and fifty dollars (\$450.00) shall be paid either within ninety days from this date, or upon delivery of a deed conveying said property in fee simple clear of all incumbrances."

At the time the above paper was signed, Mr. Shriver delivered to Mr. Diamond his check for fifty dollars drawn on the Harford National Bank to the order of the complainant and her husband, which was endorsed by the payees and paid by the bank. In the fall of 1909, the Electric Company removed the trees on the route of the pole line across the plaintiff's property preparatory to erecting the poles, and the complainant and her husband made preparations to remove from the property. They had rented a house, and removed some of their property to the rented premises. On the 14th of December, 1909, Mr. Shriver called at the house of the complainant, and William Diamond, her husband, asked for the contract of sale, or option, as it is called in the evidence. At the request of Mr. Shriver, William Diamond came to Belair that day, and met Mr. Shriver in the Court House. Shriver's account of what took place at that interview and the

Md.]

Opinion of the Court.

purpose of the meeting (and his testimony is not really disputed) is as follows: "We came up to Belair, and when we got up here we found Mr. Robinson was in Court, and that he would not be out until recess. I talked with Mr. Diamond in the hall downstairs, and he said "let me look at that option" and I took it out of my pocket, and he said "I will take good care of it." He said "let me look at it," and he put it in his pocket and walked outside where he met Mr. Charlie Archer who had him in tow, and took him into Mr. Harry Carver's office. I then went over and made demand on him and on Mr. Carver for the paper which belonged to me, and they both refused to give it up, and I left the matter then, having made demand on them after that endeavor to settle it; I hadn't any idea he was going to Mr. Carver's at that time, because we had talked of going to Mr. Robinson's. On the same day Mr. Carver sent Mr. Shriver a copy of the contract to which was attached the following signed by the complainant and her husband: "The ninety days stipulated in the annexed option and agreement having expired within which the balance of purchase money was to be paid, all rights of said James R. Magness and his assignee or assignees thereunder have ceased and determined." Mr. Shriver at once returned the copy, stating that he did not recognize in any way the right of the Diamonds to determine the agreement. There was a mortgage of one hundred and sixty-six dollars on the property held by a Miss McIlvain, who was represented by Mr. Thomas H. Robinson. It was necessary that this mortgage be released, and Mr. Shriver had seen Mr. Robinson about the matter, but so far as the record shows this mortgage has never been released.

On the 20th of April, 1910, Mr. Shriver tendered the complainant in gold coin the full amount of the purchase money and interest, and at the same time presented to her and her husband for execution a deed for the property to himself. This they refused to execute. He then began the erection of the poles, and was stopped by the injunction.

The complainant claims that she had a right to rescind the contract, and having rescinded it by the notice of December 14th, 1909, all rights which may have been acquired under the agreement were thereby terminated, and her complete ownership in the property was then restored. She bases her right of rescission, first, upon alleged misrepresentations made by James R. Magness in securing the option of July 2nd, 1909; and secondly, that time was of the essence of the contract of August 2nd, 1909, and inasmuch as the purchase price was not paid within ninety days of that date all rights under the contract were lost.

As to the first contention we find nothing in the record to support it. We fail to find any false or material misrepresentation inducing either the option or contract of sale. The complainant testified that Mr. Magness stated that he wanted to buy the property to build a blacksmith shop upon it, and that she did not know Mr. Shriver in the transaction. It appears that Magness wanted certain portions of the property and had made some arrangements with Shriver by which he expected to get such parts thereof as were not needed by the electric company. But there is nothing to show (indeed, it is not claimed) that the complainant would have refused to sign the option had she been aware of the arrangement between Shriver and Magness. When the contract of August 2nd, 1909, was signed, William Diamond, the husband, knew of Shriver's interest in the purchase.

As to the second contention. It is the duty of the Court to construe the contract. The intention of the parties gathered from the language used, read in the light of the circumstances existing at the time, must prevail. When thus examined there is nothing in the contract to take it out of the general rule that time is not of the essence of the contract. A clear statement of this rule may be found in *Scarlett v. Stein*, 40 Md. 525: "Parties may no doubt make time an essential part of a contract, and in such cases the failure by one of the parties to perform his part of the obligation within the time

Md.]

Opinion of the Court.

prescribed discharges the other from all liability under the contract. Whether time is to be considered *as of the essence of the contract* must, of course, depend upon the intention of the parties. When this intention is expressed in clear and unambiguous terms the contract must speak for itself, and the liability of the parties must be determined by the plain and obvious meaning of the language used. If, however, this intention is not expressed in clear and direct terms Courts may look to the acts and conduct of the parties in order to find out the meaning which they themselves have put upon the contract." To the same effect are the cases of *Derritt v. Bowman*, 61 Md. 526; *Wilson v. Herbert*, 76 Md. 498; *Gilman v. Smith*, 71 Md. 174; *Coleman v. Applegarth*, 68 Md. 21.

A stipulation that the purchase price shall be paid at or before a certain day or within a certain period does not make time the essence of the contract with respect to payment. *Pom. Spec. Perf. of Con.*, 2d ed., 392, and cases there cited. But aside from this, the complainant was under an obligation to convey the property to Shriver "in fee simple clear of all incumbrances." This she never offered to do, nor does she appear to have been in a position to do. Shriver was ready to pay within the time stipulated if he could have gotten a clear title, and the inability of the plaintiff to execute a deed of the character she obligated herself under the contract to deliver is a sufficient reason for the failure of Shriver to pay the purchase price. It was the evident intention of the parties that he should have such a deed either before or at the time the money was paid. There were some exceptions to the testimony, but these need not be considered at any length. The testimony excepted to by the plaintiff related to the attempt made by the parties to get a clear title. This testimony was properly admissible as a reason or excuse for the delay in perfecting the sale. Had the evidence excluded by the Court remained in the case, it would not have changed our conclusion.

Where the language of the contract is uncertain and obscure *the acts and conduct* of the parties may be looked to to discover the meaning of the language used; but the parties cannot testify as to the understanding or interpretation of the contract. Our conclusion is that it was not within the power of the complainant under the facts and circumstances disclosed by the record to rescind the contract of August the 2nd, 1909, and, therefore, the decree of the lower Court will be affirmed.

Decree affirmed with costs.

WILTON SNOWDEN, ADMINISTRATOR *d. b. n.* vs.
CROWN CORK & SEAL COMPANY ET AL.

Gift Inter Vivos to Unincorporated Association for Charitable Purposes.

An executed transfer of shares of stock, made by way of gift *inter vivos*, to an unincorporated association is valid, although the association is composed of an uncertain and fluctuating membership, who do not have a common interest in the property.

The owner of shares of stock in a corporation caused the same to be transferred on the books of the company and a new certificate issued in the name of Mrs. U., "treasurer of the Baltimore branch of the Woman's Foreign Missionary Society, or any other future treasurer of said branch." The donor before making delivery of the certificate to the treasurer wrote on it as follows: "I have transferred and given to Mrs. U., the treasurer of the Baltimore Branch of the Woman's Foreign Missionary Society, all my interest in the within certificate of seventy shares of stock, only reserving the payment of the dividends, to be paid by Mrs. U. or any

Md.]

Opinion of the Court.

succeeding treasurer of said Branch to Mrs. M. during the term of her natural life, after her decease the stock to be kept and held by said treasurer in trust and dividends all devoted to the Madison Avenue Auxiliary Branch of said society." Both the Baltimore branch and the auxiliary here mentioned are voluntary unincorporated associations which send the money they collect to the Woman's Foreign Missionary Society, which is incorporated. After the death of the life tenant the shares of stock were claimed by the administrator of the deceased donor. *Held*, that the gift of the shares had been consummated; that the donee had capacity to accept the same; that, as there was no intention to create a trust, the Rule against Perpetuities was not violated, and that consequently the gift is valid.

Decided February 2nd, 1911.

Appeal from the Circuit Court of Baltimore City (NILES, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Richard S. Culbreth and Wilton Snowden, Jr., for the appellant.

Richard M. Duvall and John Philip Hill, for the appellees.

URNER, J., delivered the opinion of the Court.

It is well settled in this State that a gift *by will* to an unincorporated association is invalid. In the case now before us it is to be determined whether a gift to such an association consummated *inter vivos* must be held nugatory.

On April 24th, 1893, Francis A. Crook endorsed and executed upon his certificate for seventy shares of the capital stock of the Crown Cork and Seal Company of Baltimore

City an assignment, under seal and duly witnessed, as follows: "For value received I hereby assign the within stock and certificate to Mrs. Eliza R. Uhler, Treasurer of the Baltimore Branch of the Woman's Foreign Missionary Society, or any future Treasurer of the said Baltimore Branch of said Missionary Society." The certificate was then surrendered by Mr. Crook to the company, with instructions to transfer the stock on its books in accordance with the assignment. This was immediately done and a new certificate was issued reciting "that Mrs. Eliza R. Uhler, Treasurer of the Baltimore Branch of the Woman's Foreign Missionary Society, or any other future Treasurer of said Baltimore Branch of that Society is entitled to Seventy Shares of the capital stock of the Crown Cork and Seal Company of Baltimore City, transferable on the books of the Company on return of this certificate duly endorsed." The new certificate was received from the company by Mr. Crook, and he subsequently delivered it to Mrs. Uhler, after having written and signed upon it at his office the following:

"I hereby certify that on this 24th day of April, 1893, I have transferred, made over and given for value received to Mrs. Eliza R. Uhler, Treasurer of the Baltimore Branch of the Woman's Foreign Missionary Society, all my right, claim and interest in and thereto of the within certificate of 70 shares of stock, only reserving the payments of the dividends, to be paid by Mrs. Uhler, or by any succeeding Treasurer of said Baltimore Branch, to Mrs. Augusta Isabella Mowinckel (now in her 76th year, and at present residing at 2006 McCulloh street, Baltimore), during the term of her natural life; after her decease the stock to be kept and held by said Treasurer in trust and dividends all devoted to the Madison Avenue Auxiliary Branch of said Society."

During the succeeding fifteen years and until the death of Mrs. Mowinckel in December, 1908, the dividends on the stock were regularly collected and paid by Mrs. Uhler, and

Md.]

Opinion of the Court.

her successors as treasurer, to the life beneficiary. The company has declined, however, to pay the dividends which have been declared since the expiration of the life estate because of doubts it entertains as to whether the transfer of the title to the stock, "under the circumstances and in the manner" stated, was effective, "except upon trust for Mrs. Mowinckel for life," and whether the endorsement on the new certificate might not be construed to be "an attempt to create a trust for an unincorporated voluntary association," or an infringement of the Rule against Perpetuities, "in which event the stock * * * might be declared to belong to the personal representatives" of Mr. Crook. It was insisted, therefore, by the company that these questions should be judicially determined, or a release obtained from the representatives of Mr. Crook, who died in 1894, before it should be required to assume the responsibility of paying dividends on the stock or permitting its further transfer.

In order to meet this requirement of the company the present proceeding in equity was instituted. An administrator *de bonis non* was duly appointed and made a co-defendant with the company, to the end that the estate of Mr. Crook might be properly represented. The bill was filed by The Woman's Foreign Missionary Society of the Methodist Episcopal Church, a corporation, and Margaret D. Rawlings, the present treasurer of the Baltimore Branch of the society.

In addition to the facts we have mentioned, it appears from the bill that the first-named plaintiff was incorporated in 1884 under the laws of the State of New York. It was formed by the amalgamation of various local societies, including the one now known as the Baltimore Branch. The constitution of the corporate body provided for the maintenance of a general office in the City of New York to serve in part as a central agency for the branches with respect to work common to them all. The management of the corporation was vested in an executive committee in whose membership the branches were represented. There are eleven of

these branches, each of which has charge of the work of the corporation in certain specified States of the Union. The plan of organization also includes further subdivisions of the corporation known as auxiliaries. These are attached to various Methodist Episcopal Churches and are under the direction of the branches within whose respective territory they operate. The Madison Avenue Auxiliary mentioned in the endorsement on the certificate in question is one of these agencies. There is no membership in the branches and auxiliaries distinct from that in the general society. The function of each auxiliary, as defined by the by-laws of the corporation, is to "aid its branch in interesting Christian women in the evangelizing of heathen women and in raising funds for this work;" and all such funds "belong to the Woman's Foreign Missionary Society, and shall not be diverted to other causes." It is also provided generally that all money raised under the auspices of the society shall belong to the corporation. The branch treasurer is authorized and directed to receive all funds of the branch and to disburse them in accordance with particular corporate regulations. There are other provisions quoted in the bill from the constitution and by-laws of the corporation further demonstrating the vital and mutually dependent relationship existing between the society and its co-ordinate agencies and subdivisions.

The bill states that Mr. Crook and his wife, Mary E. Crook, had been for many years and until their death members of the Madison Avenue Methodist Episcopal Church, in the City of Baltimore; that the former had been a constant and liberal contributor to all the financial enterprises and benevolences of the plaintiff corporation through its Baltimore Branch and the Madison Avenue Auxiliary, and was thoroughly conversant with the objects and purposes of the society and with its organization, management and administration. It is mentioned also that Mrs. Crook was the first president of the Madison Avenue Auxiliary, and that the corporation, through its Baltimore Branch, has for many

Md.]

Opinion of the Court.

years maintained and supported certain mission work in Foo-chow, China, under the name of "The Mary E. Crook Memorial."

It is asserted in the bill that the stock and dividends in controversy belong to the plaintiffs, but that as the Crown Cork and Seal Company has suggested doubts as to their rights in the premises and has refused to pay dividends on their demand, they are entitled to have the certificate and the endorsement thereon construed and their rights adjudicated. There is a prayer that the plaintiff treasurer of the Baltimore Branch may be declared the owner of the seventy shares of stock for the corporate purposes of the society.

The Crown Cork and Seal Company filed an answer admitting the facts alleged, stating its doubts as already indicated, and submitting to the judgment of the Court; while the administrator *de bonis non* of the estate of Mr. Crook demurred to the bill upon the grounds: that the gift of the stock was void because made to voluntary unincorporated associations; that it is a trust too indefinite to be enforced; and that it violates the rule against perpetuities. From the order of the Court below overruling his demurrer the administrator has appealed.

If the Baltimore Branch was capable of receiving a gift of stock from a living donor under the circumstances shown by the record there would be no occasion to hold the gift invalid simply because of the trust or condition imposed for the application of the dividends to its auxiliary. The capacity to take being recognized, the recipient would occupy the same position with respect to such a trust for its own uses as any other capable donee.

It has been repeatedly held that where there is a devise or legacy to a *corporation* for any of its authorized agencies, the gift will be sustained even though the designated beneficiaries may be unincorporated associations. *Baltzell v. Church Home*, 110 Md. 244; *Bennett v. Humane Society*, 91 Md. 10; *Woman's Foreign Missionary Society v. Mitchell*,

93 Md. 199; *Ege v. Hering*, 108 Md. 391; *Erhardt v. Balto. Monthly Meeting of Friends*, 93 Md. 669; *Doan v. Ascension Parish*, 103 Md. 662; *Barnum v. Baltimore*, 62 Md. 275; *Halsey v. Convention*, 75 Md. 275; *Hanson v. Little Sisters of the Poor*, 79 Md. 434; *Baptist Church v. Shively*, 67 Md. 493; *Trinity M. E. Church v. Baker*, 91 Md. 539. The general rule in such cases is that the donation will be regarded as made to the corporation not in trust but merely upon condition that it be applied to the particular corporate use, unless the intention to create a trust be clear; and such a disposition is held, therefore, not to violate the rule against perpetuities or to be void because of uncertainty as to its objects. For example, in *Woman's Foreign Missionary Society v. Mitchell*, *supra*, the testatrix directed that certain funds be held "in trust" by the Board of Managers of an incorporated missionary society for specified purposes including the education of girls in India. This was decided not to be a *trust*, but a gift to the society for use in the line of its mission work; and it was upheld as against both the objections just stated.

In the case before us the same principle must be applicable if the donee has the requisite capacity to retain the gift it has received. It would be an illogical and unjust discrimination to hold that though a voluntary benevolent society might be fully entitled to a gift when made *inter vivos*, and though the gift may have been dedicated to the essential purposes of the association, as represented in the franchise of an existing corporation with which it is identified, yet it must be denied the benefit of the equitable principles upon which similar dispositions to corporate donees are sustained.

The gift here in question was made to the Baltimore branch for the benefit of its auxiliary, an agency operating under the direction of the former body, and both acting under the auspices of a body corporate in aid of the specific cause to which the entire organization was devoted. If the branch were incorporated, it would be perfectly clear that

Md.]

Opinion of the Court.

the disposition in question would be treated as having been made for its own defined objects and not subject to such a trust as would offend the rule against perpetuities; and we think the same conclusion is equally necessary if the society, notwithstanding its want of corporate character, is yet found to be capable of holding the stock it actually received.

It was suggested in argument that as the assignment of the stock and its transfer on the books of the company, as originally made, was in absolute terms, the donor was so completely divested of his interest in the stock as to make inoperative the declaration of trust subsequently endorsed on the certificate; but we do not find it necessary to consider this suggestion.

Independently of the question as to the capacity of an unincorporated society to become the recipient of a gift, there can be no doubt as to the transfer by the donor in this case being absolute and irrevocable. *Albert v. Albert*, 74 Md. 534; 20 *Cyc.* 1212; 14 *Am. & Eng. Encyc. Law*, 2nd Ed. 1009. Every legal requirement was observed to divest him of all title to the stock and to place it securely in the donee. *Baltimore Retort Co. v. Mali*, 65 Md. 93; *Pennington v. Gittinger*, 2 G. & J. 208. The assignment, surrender and cancellation of the old certificate, and the issue and delivery of the new one to the assignee, effectually accomplished the purpose of Mr. Crook to give the stock to the Baltimore Branch for the objects indicated unless this deliberate intention must be defeated upon the theory that the association was incapable of receiving a donation it has in fact held and administered for years.

If, in spite of the completeness of the transfer, the Baltimore Branch is incompetent to retain this stock as against the claim of the personal representatives of the donor, it would be in the same unfortunate position with respect to any other donations it may have received. As the invalidity of the benefaction would, in such event, depend upon the incapacity of the donee and not upon the nature of the

thing given, it is obvious that if the gift here under consideration had been made in money instead of stock, the society would have held it by an equally precarious tenure.

The controlling question, therefore, is whether an unincorporated association has any capability whatever for the reception or retention of a gift *inter vivos*; and as such a gift, when perfected, vests as valid a title to personalty in the donee as one acquired in any other mode (20 *Cyc*, 1212), it is apparent that the inquiry we are to make is broad enough to involve the right of a voluntary society to acquire money or property by any method.

When the gift now in dispute was made the law of Maryland distinctly recognized the existence of such associations as the Baltimore Branch by providing in *Code*, Art. 23, sec. 415, that: "It shall be sufficient in any suit, pleading or process, either at law or in equity, or before any justice of the peace, by or against any joint stock company or association, to describe the said joint stock company or association by the name or title by which it is commonly known, or by or under which its business is transacted."

The right thus conferred was exercised in the cases of *Littleton v. Wells, etc., Council*, 98 Md. 456, and 100 Md. 416, and in *My Maryland Lodge v. Adt*, 100 Md. 238. In the case first cited it was said: "The statute does not take away the right existing at common law to sue the members of an unincorporated association, but the creditor has the option to sue either the association or the members, and when the suit is against the former a judgment obtained can only affect its joint property." This is a clear recognition of the ownership of community assets by such a society, and its right to sue for their protection or recovery is equally manifest under the statute. In conferring upon an unincorporated association the right to come or be brought into Court in the name of the society as distinguished from the names of its individual members, the law plainly recognizes not only the existence of a common interest but also its repre-

Md.]

Opinion of the Court.

sentation by the organized body. The power to sue in such a representative capacity presupposes the right to acquire and possess in the same capacity the interests which a suit might protect.

If the stock in question had been bought by the Baltimore Branch from Mr. Crook he could have sued it for the purchase price and collected his judgment out of its joint assets. If he had declined to deliver the stock in pursuance of such a sale, the branch could have maintained an action against him for the breach of contract. It is clear that under our law neither of the parties to the transaction would have been permitted to escape the obligation it imposed merely because the vendee society was not a body corporate.

Before the enactment of the statute quoted certain persons, as members of The Southern Orphans' Association of Baltimore, an unincorporated society, sued for the recovery of a fund earned by their joint industry for the purposes indicated by the name of their organization. The money had been deposited in bank and the claim was prosecuted in interpleader proceedings as against the opposing claim of a corporation asserting ownership of the fund as successor of the voluntary body. The case was presented on appeal to this Court in *Mears v. Moulton*, 30 Md. 142, and it was held that "the right of *the members* of this association, whether incorporated or not, to claim the money cannot be questioned. They cannot sue in a corporate capacity, but as individuals having a common interest. Voluntary associations are recognized by law, and the right of the members to sue in matters pertaining to or affecting their interests is expressly asserted in *Fells v. Read*, 3 Vesey, 70; *Lloyd v. Loaring*, 6 Ves. 773; *Babb v. Read et al.*, 5 Rawle, 151, and in *Bealty and Ritchie v. Kurtz et al.*, 2 Peters, 556."

In *Gittings v. Mayhew*, 6 Md. 113, it was held that the building committee of a voluntary association formed for the purpose of building an Athenæum might, in the absence of

incorporation, sue for subscriptions on the faith of which expenses had been incurred; and in a similar case JUDGE COOLEY said: "There is no doubt that the trustees of any unincorporated society which is organized for a lawful purpose may receive gifts and promises on its behalf." *Allen v. Duffie*, 43 Mich. 4.

The recognition thus accorded to unincorporated associations at common law was simply extended by the act to which we have referred so as to permit them to represent for the purposes of litigation the joint interests of its members.

In the case at bar we find a voluntary society possessed of a certificate of stock issued in the name of its treasurer and donated to the association for the specific objects for which the individuals who compose it have combined. Whether the gift be regarded as having been made to the organization as a representative entity or to its members for the promotion of their common enterprise, it has been actually and completely consummated, and to permit it to be revoked could only be upon the theory that such an association, though distinctly recognized by the law, can have no vested property rights which are entitled to be respected.

The ground upon which we are asked to deny to the Baltimore Branch the capacity to retain the stock it holds is that an unincorporated society has been frequently decided by this Court to be incapable of receiving a devise or bequest, and that there is no distinction in this regard between a gift by will and a perfected gift *inter vivos*. In our judgment there is a very practical and important difference between these two methods of transferring title. A testamentary gift is simply an expression of the will of the testator which can become effective only by the aid and agency of the law; while a gift from a living person to another is an act wholly *in pais*. So far as the participation of the donor himself is concerned, the former disposition is merely *declared*, while the latter is *consummated*. The one is *in fieri* and the other is an *accomplished fact*.

Md.]

Opinion of the Court.

If, instead of making his gift to the Baltimore Branch in his lifetime, Mr. Crook had made a corresponding bequest by will, the conditions would have been altogether different. The title to the stock could have passed, if at all, only through the processes of administration (*Rockwell v. Young*, 60 Md. 563; *Smith v. Wilson*, 17 Md. 460); and the identification of the beneficiaries would have been a matter for judicial inquiry. In such a situation the unincorporated legatee, not being an artificial person created by the law, and its membership not being certain and definite, and the Courts of this State having no jurisdiction to enforce charitable uses under the Statute of 43 Elizabeth or apart from its provisions, the bequest could not be given effect. *Dashiell v. Attorney-General*, 5 H. & J. 392; *Same v. Same*, 6 H. & J. 1; *Rizer v. Perry*, 58 Md. 112; *State, use Trustees M. E. Church, v. Warren*, 28 Md. 338; *Orrick v. Boehm*, 49 Md. 72; *Trinity M. E. Church v. Baker*, 91 Md., *supra*. The law would decline to gratify the expressed intent because, under its established rules, it could not recognize the designated beneficiary for the purposes of the proposed transfer of title. But a deceased donor who speaks through his will and who must make the law the instrument for the accomplishment of his wishes is under limitations which do not apply to a living donor who bestows his bounty by his own act upon objects which he himself identifies. It seems clear to us that the reason for the principle which defeats testamentary dispositions in favor of unincorporated institutions does not exist in a case like the present.

The distinction between gifts *inter vivos* and those by will, so far as they concern unincorporated associations, has been recognized in a very significant way by the Act of 1888, Chapter 249, codified as section 322 of Article 93 of the Public General Laws, which provides that "No devise or bequest of real or personal property for any charitable uses shall be deemed or held to be void by reason of any uncer-

tainty in respect to the donees thereof, provided the will or codicil making the same shall also contain directions for the formation of a corporation to take the same, and within the period of twelve calendar months from the grant of probate of such will or codicil a corporation shall be formed, in correspondence with such directions, capable and willing to receive and administer such devise or bequest."

This clearly indicates that the legislative mind did not entertain the idea that a gift made by a living person to the selected objects of his benevolence required any such statutory assistance, for it is not to be conceived that the act was intended to give any preference to testamentary donations over gifts *inter vivos*, or to exclude the latter from any recognition as a means of promoting the charitable uses which the statute proposed to favor.

In *Brown v. Thompson*, 49 Md. 431, it was held that a statutory authorization to a designated religious body to "take and hold subscriptions or contributions in money or otherwise" contemplated the right to take by gift and did not confer the power to take by will, as against the provisions of Article 38 of the Bill of Rights to the effect that every gift, sale or devise of real or personal property for religious purposes to take effect after the death of the seller or donor, without the prior or subsequent sanction of the Legislature shall be void. The Court said that the "distinction between a 'gift' and a 'sale' and a 'devise' is thus expressly recognized by the Constitution."

Every case relied upon to support the objection to the capacity of the Baltimore Branch to hold the stock in dispute involved a disposition by will. Not a single decision has been cited from any jurisdiction which denied the right of a voluntary association to retain a gift which it had received in possession and which was susceptible of transfer by the act of the parties without the aid of legal process. The mere fact that the corporation whose stock was donated has suggested doubts as to the capacity of the donee does not render the

Md.]

Opinion of the Court.

gift dependent for its original validity upon the aid of the law. For all present purposes the case is in the same position as if the administrator *de bonis non* of the estate of Mr. Crook were suing for the recovery of the stock from the Baltimore Branch. In fact, as the Crown Cork and Seal Company has not appealed, the administrator is the only party in this Court who questions the society's title. The donee is not seeking to have carried into effect an *intention* expressed by Mr. Crook, but is asking us not to disturb an *act* which he himself fully and finally performed. The administrator's contention, on the other hand, is not that the gift remained unperfected in any respect so far as Mr. Crook was concerned in his lifetime, but that the *actual* recipient was incapable of *legally* receiving, and that there is no difference in principle between the nullification by the Court of a gift *inter vivos* and the inability of the Court to gratify a testamentary intent.

It was argued for the appellant that the Statute of 43 Elizabeth relating to the enforcement of charitable uses places gifts *inter vivos* in the same category with all other charitable dispositions by its recital that "Whereas Lands, * * * Goods, Chattels, Money and Stocks of Money have been heretofore *given*, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most generous progenitors, as by sundry other well disposed persons." An examination of the statute discloses that its purpose was to provide for the enforcement of existing donations which had not been employed "according to the charitable intent of the givers and founders," and to that end it confers certain powers upon the Court of Chancery. It does not purport to give validity to dispositions previously invalid. In view of the tenor of the statute and of the fact that it has never been in force in Maryland, we are unable to see how its recitals can affect the question we have now under consideration.

It is not necessary to discuss the various decisions of this Court holding that a gift by will to an unincorporated society is void, as we do not find the principle of those cases applicable to the wholly different issue here presented.

In our opinion the making and acceptance of the gift in this case was a valid and completed exercise of a lawful right on the part of Mr. Crook as donor and the Baltimore Branch as donee, and the latter is entitled to retain in its possession and ownership the stock it has thus received.

The argument on behalf of both the appellant and appellees was directed also to the question whether the Baltimore Branch was an integral part of the incorporated society with which it was connected and as such proper to be regarded as having the ordinary corporate capacity; but a discussion of this question is rendered unnecessary by the view we have taken as conclusive of the case.

The order of the Court below overruling the demurrer to the bill of complaint will be affirmed. *

Order affirmed with costs.

PEARCE, SCHMUCKER and BURKE, JJ., dissented and PEARCE, J., delivered the following dissenting opinion:

I have heretofore expressed my conviction that dissenting opinions rarely add any real value to the reports of adjudicated cases, and that it is wise to refrain from them, under ordinary circumstances, but as the precise question in this case has never arisen in this State, nor elsewhere, so far as I am informed, and as it is, under the peculiar doctrine in this State relating to charitable uses, a question of more than ordinary interest, I feel warranted in stating the views which I entertain, and which compel me reluctantly to dissent from the conclusions of the Court.

Md.]

Dissenting Opinion.

The facts of the case being sufficiently stated in the opinion of the Court, I shall not restate them here, merely observing that for the sake of brevity I shall in this opinion designate "The Woman's Foreign Missionary Society of the Methodist Episcopal Church," as The Missionary Society; "The Baltimore Branch of the Woman's Foreign Missionary Society of the Methodist Episcopal Church," as The Branch Society; and "The Madison Avenue Auxiliary Branch of the Woman's Foreign Missionary Society of the Methodist Episcopal Church," as The Madison Avenue Auxiliary Branch.

In *Attorney-General v. Dashiell*, 5 H. & J. 392, JUDGE BUCHANAN laid down as law that the statute of 43 Elizabeth for regulating charitable uses was not in force in this State, and that, independent of that statute, a Court of Chancery cannot, in the exercise of its ordinary jurisdiction, sustain and enforce a bequest to charitable uses, which, if not a charity, would, on general principles, be void.

In *Atty.-General v. Dashiell* 6 H. & J. 1, the same question was brought under review, with the same conclusion, the Court holding in that case the benefit of the void bequest results to the next of kin of the testator.

In *Baltzell v. Church Home*, 110 Md. 270, JUDGE BOYD, speaking for the whole Court, said: "It would serve no good purpose to compare the decisions elsewhere with those made by our predecessors in *Dashiell v. Atty.-General*, 5 H. & J. 392, and 6 H. & J. 1. These cases have been too frequently and too recently recognized by us to permit us to disturb them, if we were inclined to do so." There can, upon principle, be no distinction, in this *respect*, between a gift under a will, and a gift *inter vivos*, and we have been able to discover none in the books. It is true that in *Brown v. Thompkins*, 49 Md. 431, this Court held that when the Legislature gives its sanction, and authorizes a religious body to take and hold subscriptions or contributions in money or otherwise, for religious purposes the power thus to take by gift

does not embrace power to take by will, and gave as a reason for thus holding, that "Article 38 of the Bill of Rights declares that every '*gift*', '*sale*' or '*devise*' of real or personal property for *religious purposes*, to take effect after the death of the '*seller*' or '*donor*,' without the prior or subsequent sanction of the Legislature, shall be void. The distinction between a '*gift*,' and a '*sale*,' and a '*devise*,' is thus expressly recognized by the Constitution." But it is clear that the Court did not mean to declare that there was any distinction between a gift under a will, and a gift *inter vivos*, and it is equally clear that the distinction meant was between benefits acquired from "sellers" or "donors," and those acquired from devise or bequest, and consequently what was there said has no application in the present case. Whatever then will avoid a gift under a will must avoid a gift *inter vivos*. If the devise or bequest fails because the devisee or legatee, as an unincorporated body is incapable of taking title, how is incapacity converted into capacity, because the gift is *inter vivos* and not under a will? To hold that in one case the gift is invalid, and in the other is valid is to confess the Courts to be impotent to avoid or prevent a transaction which the law forbids to be made, and declares to be void when attempted.

In *Halsey v. Convention*, 75 Md. 275, JUDGE ROBINSON, in speaking of the capacity of a corporation to take property for the purpose of founding and maintaining a school for boys, uses the words *gift* and *devise* as interchangeable, and JUDGE MCSHERRY, in *Bennett v. Humane Society*, 91 Md. and in *Missionary Society v. Mitchell*, 93 Md., repeatedly uses them in the same manner, as do the leading text writers on the subject of gifts. In the one case, as in the other, if the donee is incapable of taking *for the expressed purpose of the gift*, the gift must fail. In case of a will, the law interposes, when properly invoked, to prevent an attempt to perfect the gift by delivery, and in case of a gift *inter vivos*,

Md.]

Dissenting Opinion.

the law, when properly invoked, interposes to declare the physical delivery to be ineffectual and to declare the donee to be a trustee for those in whom the law vests the subject of the gift. In *Lane v. Eaton*, 69 Minn. 141, where, as in Maryland the English Law of Charitable trusts, and the doctrine of *cy pres* has never been recognized, it was held that a voluntary unincorporated association, constituting a branch of the Salvation Army, whose membership is fluctuating and uncertain, could not be the beneficiary under a will, and in like manner in another case a donation to the "Church of England" was held void, that not being a corporate body. In all such cases the donee or legatee takes only *the legal title*, and a trust results by implication of law to the donor or his representatives, or to the testator's residuary legatees or next of kin. *Sheedy v. Roach*, 124 Mass. 172; or as expressed by LORD ELDON, in *Morice v. Bishop of Durham*, 16 Vesey, 521, "though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law."

In *M. E. Church v. Jackson Square Church*, 84 Md. 173, which was a case of a conveyance of land held void, there was shown to be a valuable consideration for the conveyance and for that *reason only*, a resulting trust was not raised, and the grantees were held to take an absolute interest. But here there is no consideration. In *Trustees v. Hart's Executors*, 4 Wheat., JUDGE MARSHALL said: "The bequest was intended for a society which was not at the time, and might never be incorporated. *According to law it is gone forever*, and the property vests, if not otherwise disposed of, in the next of kin. Can the bequest be taken by the individuals who compose the association at the death of the testator? The Court is decidedly of the opinion they cannot. *No private advantage was intended for them.*"

In *M. E. Church v. Warren*, 28 Md. 338, where the testatrix bequeathed a moiety of the residue of her personal estate to the M. E. Church at Greenborough, that church was not incorporated when the will took effect, though it subsequently became incorporated. JUDGE MILLER said: "As a general rule, it is clear that a bequest or devise to an unincorporated association is void, and it is only by virtue of that peculiar jurisdiction exercised by Courts of Equity in regard to charitable uses that such bequests have ever been sustained * * *. It has been decided that the Statute of 43 Elizabeth concerning charitable uses has not been adopted, nor its principles recognized as part of the common law of this State, * * *. This bequest must therefore be held void, because there was, at the time the will took effect, no legatee in being capable of taking it."

In the case now before us the Missionary Society is a duly incorporated body capable of taking for its corporate purposes under a devise, bequest or gift. The purpose of Mr. Crook was to make a gift, but the attempted gift was not to the corporate entity, the Missionary Society, but either to the Branch Society, or to the Madison Avenue Auxiliary, according as the one or the other might be held to be the real beneficiary under the face of certificate No. 353, or under the indorsement thereon which has been transcribed herein. If the proposed gift could be considered as complete in virtue of the assignment to Mrs. Uhler as Treasurer of the Branch Society, of the certificate of stock No. 122, and the issuance by the Crown Cork and Seal Company of the new certificate No. 353 to her as Treasurer of the Branch Society, then the gift was to the Branch Society. If, however, effect is to be given to the subsequent assignment and declaration of trust in favor of the Madison Avenue Auxiliary, endorsed on certificate No. 353, then the gift was to the Madison Avenue Auxiliary. But neither of these are corporate bodies. Both are voluntary unincorporated associations of individuals.

Md.]

Dissenting Opinion.

and under all the Maryland cases, such associations cannot take a gift such as that under consideration. They have no common personal interest in the subject of the gift. Hence they do not, in this case, come within the class of cases of which *Mears v. Moulton*, 30 Md. 142, is an illustration. In that case Mrs. E. A. F. Mears, as treasurer had an account in the Chesapeake Bank. Mrs. Mears was afterwards removed, and Mrs. Moulton was appointed treasurer in her stead. The bank filed a bill of interpleader to protect itself against the rival claimants of the fund. It was insisted that the appellees, Mrs. Moulton and others, members of a voluntary unincorporated association were incapable of suing, either at law or in equity, but the Court decreed the money should be paid to Mrs. Moulton as new treasurer, and this decree was affirmed on appeal, JUDGE ROBINSON saying: "It is an error to suppose the claim of the appellees is based upon, or in any manner depends upon the provisions of 43 Elizabeth. It is admitted on both sides that the fund in controversy was *earned* by the joint labor and industry of a voluntary association of ladies, under the name of the "Southern Orphans' Association of Baltimore." As such, it was by them deposited in bank and the right of the *members* of this association, whether incorporated or not, to claim the money cannot be questioned. They cannot sue in a corporate capacity, but as individuals *having a common interest*."

The Missionary Society however seeks to bring the case within the exception established in *Shively v. Baptist Church*, 67 Md. 495. In that case there was a bequest to a church, a corporate body, "to be applied to the Sunday School belonging to, or attached to, said church." CHIEF JUDGE ALVEY said: "The Sunday School is shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church," and the bequest was held good; and that case was followed in *Halsey v. Convention*, 75 Md. 275; *Woman's*

Foreign Missionary Society v. Mitchell, 93 Md. 199; *Doan v. Ascension Parish*, 103 Md. 662; *Baltzell v. Church Home*, 110 Md. 270, and other cases.

But to bring this case within *Shively's case*, would be a plain inversion of the reasoning by which the bequests in that case and the other cases last cited, were sustained. In all those cases the bequests were directly to a corporate body capable of taking, and the uses to which the bequests were to be applied, were within the scope of the corporate functions and work of the capable legatee. The bequests were in fact bequests to a corporation for its general and corporate purposes. Here the gift is to a body incapable of taking, a voluntary unincorporated association, though organized as subsidiary or auxiliary, to the corporation. The proposition of the association we are now considering, like an inverted cone, must fall for want of a base upon which to stand.

This distinction was pointedly made in *Trinity M. E. Church v. Baker*, 91 Md. 539, in an opinion by the late JUDGE JONES.

One of the bequests in that case, in the ninth item of the will, was to "The Trustees of Randolph Macon College, a corporation, to be applied to aid deserving young women such as expect to attend the Randolph Macon Woman's College, at Lynchburg." A part of the work of the corporate legatee was carried on through the agency of the Randolph Macon Woman's College, organized by the parent corporation to carry out its general objects. This bequest was sustained under the decision in *Shively's case*, *supra*. But in item ten of the same will, thirty-five hundred dollars was bequeathed to the trustees of the corporation of Trinity M. E. Church, South, to be invested, and the annual income on six hundred dollars, part thereof, to be paid to the Trinity Auxiliary of the Woman's Foreign Missionary Society of the M. E. Church, South. This auxiliary was not an incorporated body, "but an independent voluntary association, called into existence by the volition of the members compos-

Md.]

Dissenting Opinion.

ing it, and continuing its existence only at the volition and pleasure of its membership," which is the precise situation in the case now before us; and that provision of item ten was for that reason held void. Another bequest under the eighteenth item of the same will was to "The Woman's College, at Lynchburg, Virginia, for the education of one or more worthy girls." The Woman's College at Lynchburg was not an incorporated body, though an organized auxiliary of the parent corporation. JUDGE JONES declared that in his opinion this bequest was void, the legatee named being incapable of taking. The majority of the Court did not deny the principle involved in the view thus expressed by JUDGE JONES, but rescued the bequest from invalidity, because they held, upon certain evidence in the case that the term "Woman's College" was a misnomer, and that the intention of the testatrix was to make *the corporation*, "The Trustees of the Randolph Macon College," the legatee under this item of her will, and that being so, this bequest was valid for the same reason that the bequest under the ninth item was valid. In this case there is no evidence upon which to find a misnomer, and as it is clear that but for the fact that the majority of the Court found there was a misnomer in that case that bequest would not have been sustained by the Court, that decision practically carries with it the authority of all the judges who sat in the case, to the effect that the gift in this case is void because the donee is incapable of taking.

This Court concurring with the learned Judge of the Circuit Court bases its opinion upon the proposition that this was a gift *perfected by delivery*, and that such a gift can no more be revoked by the donor than a sale or any other executed contract, and that if not revocable by the donor in his life, his executor, for the same reason, cannot revoke it, or dispute its validity. But surely this proposition must imply a donee capable of *taking*, just as it implies a donor capable of *making* the gift. How can there be a perfected gift unless the donor is capable of giving, and the donee is capable

of taking? To hold otherwise is to beg the question of a perfected gift. If the attempted gift were intended to vest in the individuals composing this unincorporated association, a common, private, interest, *they* would be capable of taking in such capacity, and for such purposes. But such a purpose is conclusively repelled by any possible construction to be given to any or all of the instruments by which it was sought to vest this gift, either in the Branch Society, or in the Madison Avenue Auxiliary. It is just because the Statute of 43 Elizabeth is not in force in this State, that the gifts in the cases we have cited were held to be void. That statute was enacted for the very purpose of validating gifts which would have been otherwise invalid. Both in its title and its preamble, it refers to "goods, chattels, money, and stocks of money *given*," etc., and gifts *inter vivos*, or "perfected gifts," as designated in the opinion of the Circuit Court are thus within the very terms of the act. The Court refers in support of the ground of its opinion, to section 415 of Article 23, in force from 1868 to 1908, which is as follows:

"It shall be sufficient in any suit, pleading, or process, either at law or in equity, or before any justice of the peace, by or against any joint stock company or association, to describe the said joint stock company or association, by the name or title by which it is commonly known, or by, or under, which its business is transacted." But that section refers exclusively to the *form* of pleading and could not have been designed otherwise to enlarge the powers or capabilities of joint stock companies or associations. Before that Act, such unincorporated associations were capable of suing or being sued in the names of the individuals composing the association, but their right thus to sue or be sued was limited, as held in *Mears v. Moulton*, *supra*, "to matters pertaining to or affecting their interests," etc., their common private interests. After the passage of that Act, and during its continuance upon the statute books, they could sue or be sued either by the names of those composing the association or by

Md.]

Dissenting Opinion.

the title under which their business was transacted, but there was no other enlargement of their capabilities or powers. We cannot perceive anything either in the case of *Littleton v. Wells Council*, 98 Md. 453, or *My Maryland Lodge v. Adt.*, 100 Md. 238, which supports the proposition under consideration, as in both those cases the associations were dealing with their common private interests. Their power to make contracts, or to accept gifts, must be exercised for their own private common interests, and not for those of a corporation such as the Missionary Society.

All the authorities agree that an acceptance is an essential and indispensable element of a valid gift "*inter vivos*."

In 14 *Amer. & English Enc. of Law*, 1015, 2nd ed., it is said: "To constitute a valid gift *inter vivos* there must be a gratuitous and absolute transfer of the property from the donor to the donee, *taking effect immediately*, and fully executed by a delivery of the property by the donor, and an acceptance thereof by the donee, * * *. To constitute a valid gift there must be the assent of both parties. There must be not only a delivery of the property, but also an *acceptance on the part of the donee*." *Idem* 1027.

In *Thornton on Gifts*, section 79, the author says: "Like in a contract there must be two *persons* to every gift, for an acceptance of the thing given is as essential as the acceptance of the terms of the proposed contract * * *. Until acceptance the donor has full power to revoke the gift, although every other act has been performed that is essential to make a perfect gift, section 81 * * *. This acceptance must be within the lifetime of the donor. It cannot be made after his death," sections 80 and 116. The decided cases sustain these text writers.

In *Pierce v. Burroughs*, 58 N. H. 302, it was held that "the assent of both parties is as necessary to a gift as to a contract." In *Scott v. Berkshire Bank*, 140 Mass. 157, the Court said, "the acceptance of the donee completes a contract between the donor and the bank."

In *Gray v. Nelson*, 77 Iowa, 69, a gift was held invalid. "because the evidence showed there was no acceptance of the gift."

In *Payne v. Powell*, 5 Bush. 248, where there was a conflict of evidence as to delivery, the Court said, "even if the view that there was delivery was adopted, still there is no evidence of an acceptance of the gift in the life of the father;" and it may be observed here that all the cases agree that in gifts between parent and child the Courts lean toward sustaining the gift if possible.

In *Love v. Francis*, 63 Mich. 192, it is said, "the acceptance of a gift need not be made immediately. It is sufficient if made before revoked *by death* or otherwise."

In *Blanchard v. Sheldon*, 43 Vt. 514, it is said, "to constitute a valid gift there must be *both* a delivery by the donor to the donee, or to someone for the donee, *and* an acceptance by the donee."

And in *Nickerson v. Nickerson*, 28th Md. 332, this Court speaking through JUDGE ALVEY said: "To complete the investiture of title there must be the *mutual consent and concurrent will* of both donor and donee, or trustee or guardian acting for the donee in the acceptance of the gift," and in *Taylor v. Henry*, 48 Md. 557, JUDGE ALVEY again declared acceptance to be essential. It is true that a donee is not required to accept a gift in person. He may, if *sui juris*, authorize an agent to accept it, or he may ratify acceptance by an agent who has undertaken to accept for him without authority. But, "it must be shown either that the agent has authority to accept or that his act was ratified by the donee before a revocation." *Thornton on Gifts*, section 88.

I may have dwelt unduly upon the necessity of an acceptance by the donee, but it seemed to me important to emphasize that necessity as the foundation of the conclusion to which I am driven, viz, that it is impossible to find any acceptance in this case.

Md.]

Dissenting Opinion.

It is conceded that at common law a bequest to an unincorporated body is void, and the reason is that it is neither a natural person nor an artificial person. It is neither endowed with the intelligence and volition which are natural attributes of every sane person of mature years nor has it been invested by the State, with those powers to be exercised for its benefit through the agency of natural persons, who in their aggregate capacity constitute the body corporate.

The Legislature of this State with the commendable purpose of preventing the failure of bequests or devises in such cases, has provided that such bequests or devises shall not fail, if the will making the same shall contain directions for the formation of a corporation to take the same, and the actual formation of such corporation within twelve months from the date of probate of the will, and this provision serves to show how settled and inflexible is the rule of the common law, that an unincorporated body cannot take a bequest or devise. In the case at bar, there was no corporate body answering to the description of the donee in this case, and there has been none such formed since the date of the attempted gift, even if it were possible to suppose that the provision of the Code above mentioned, could, by any rational construction, be held to embrace such a case as this.

In *Hannon v. The State*, 9 Gill, 440, where a gift by deed was attacked, the Court of Appeals said: "Every sane man has authority to give away his property, unless he attempts it upon terms which the law repudiates as against sound policy. He cannot give it to be held in perpetuity, or by any tenure not consistent with the rules of law, nor may he devote it to impolitic or criminal objects." The English Statute of 43 Elizabeth was necessary in England to give validity to such charitable bequests, devises and gifts, as that now under consideration. The Courts of this State have declared that this statute "has not been adopted in this State, nor its principles recognized as part of the common law of this State." They have repudiated that statute as

against sound policy and to permit property in this State to pass and be held under its policy and principles, is in the language of 9 *Gill, supra*, to sustain a gift attempted to be made "upon terms which the law repudiates as against sound policy" and "to be held by a tenure not consistent with the rules of law." In *Thornton on Gifts*, section 64, it is said a gift cannot be made to a dead person, "*for a dead person has no power to accept it.* Nor can one be made to an unborn infant," for the same reason. In the latter case the capacity to accept has never sprung into existence. In the former it has perished with the loss of intelligence and volition.

The principle upon which the text is founded is the same that in this case denies validity to the attempted gift and was established as far back as 12 *Cokes Rep., Hayne's case*, 113. "The case was that one Wm. Haynes had digged up the several graves of three men and one woman in the night, and had taken their winding sheets from their bodies, and had buried them again, and it was resolved by the Justices at Sergeants Inn in Fleetwood that *the property in the sheets remains in the owner, that is, in him who had property therein, when the dead body was wrapped therewith, for the dead body is not capable of it as in 11th Henry 4.* If apparel is put upon a boy, this is a gift in the law, for the boy hath capacity to take it; but a dead body, being but a lump of clay, hath no capacity * * *. *Also a man cannot relinquish the property he hath to his goods, unless they be rested in another.*" This opinion or report I conceive to contain the absolute law of this case. It is couched in the quaint language and style of the period, but modern rhetoric could add nothing to its clearness or cogency.

In *Johnson v. Hines*, 61 Md. 131, the Court was considering the effect of a conveyance made by a trustee under a decree in equity, before the payment of the purchase money and without ratification of the sale, and held that the unauthorized deed of the trustee could convey no title to the pur-

Md.]

Dissenting Opinion.

chaser, and in so holding, used the following language: "That nothing can emanate from nonentity, or, as more tersely enunciated, *de nihilo nil*, is an axiom in the physical sciences which might be appropriately transferred to a judicial investigation of this nature." And it seems not inappropriate to repeat the language here. How can acceptance be presumed, or deduced from anything in the case, if the donee is neither a natural nor an artificial person; in other words if it is a nonentity. Or, recurring to the language of the Iowa case, *Gray v. Nelson*, *supra*, how could "the evidence more conclusively show that there was no acceptance of the gift," than by showing, as it does show here, that the donee had no capacity to accept?

It can make no difference in this view of the case that the parties here are not in Court of law, but in a Court of Equity.

In *DeGrange v. DeGrange*, 96 Md. 614, this Court said: "It has been uniformly held that unless the gift was perfected, and the subject matter of it had passed out of the dominion of the donor *and into that of the donee* in the life time of the donor, the gift was not perfected, and the donee could not recover it from the estate of the donor."

In no case will a Court of Equity interfere to perfect a defective or imperfect gift. "A gift which is not good and valid in law cannot be made good in equity." *Pennington v. Gittings*, 2 G. & J. 27; *Cox v. Hill*, 6 Md. 287. "Equity cannot make that good and enforceable as a gift *inter vivos*, which was incomplete, and therefore not enforceable at law." *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 98.

I share the desire of the learned Judge of the Circuit Court and of my brothers in this Court, to sustain this gift, but I have not been able to reconcile the decree which is here affirmed with the convictions which I entertain as to the legal principle which should control the case. I feel constrained to adopt the language of JUDGE MILLER, in *M. E. Church v.*

Warren, supra, where he said: "It is to be regretted that the wishes of the testatrix (donor) should be thus defeated, but our duty is to declare the law as we find it to be, not to make law for the purpose of carrying out what we may think in individual cases ought to be done," and for the reasons stated, but with sincere respect and deference to the views of the majority of the Court, I think the decree of the lower Court should be reversed and the bill be dismissed.

I am authorized by JUDGE SCHMUCKER and JUDGE BURKE to say that they concur in this opinion.

THE HANNIS DISTILLING CO. *vs.* THE MAYOR
AND CITY COUNCIL OF BALTIMORE.

*Taxation of Property in This State Owned by Non-Resident—
Validity of Statute Requiring Custodian of Distilled
Spirits to Pay Taxes Assessed Against Unidentified
Owner—Foreign Corporation Doing Business in
This State Subject to General Statute.*

Although it has been held that under the Declaration of Rights Art. 15, taxes are levied *in personam* and not *in rem*, yet the custodian in this State of property owned by a non-resident may be required to pay the taxes on such property, when he is allowed a lien on the same for his reimbursement. That is not a taking of property without due process of law within the meaning of the Federal Constitution.

It is not essential to the exercise of the power to tax the owner of property *in personam* that it should be exerted directly against him by name.

A foreign corporation doing business in this State is subject to the provisions of Code, Art. 81, secs. 214 *et seq.*, which require every warehouse company to pay a tax on the dis-

Md.]

Opinion of the Court.

tilled spirits in its possession by whomsoever owned, although the owner be not identified. Those provisions do not require the assessment of the tax to be made in the name of the owner.

Foreign corporations which are permitted to carry on their business in this State are held to have accepted the restrictions and duties imposed by the laws of this State, and they can claim no other or greater rights than those accorded to domestic corporations.

The provisions of Code, Art. 23, secs. 137 to 141, relating to the conditions under which a foreign corporation may be allowed to do business in this State, do not operate to exempt a foreign corporation doing a warehouse business here from the general law regulating all warehouse companies.

**Decided February 2nd, 1911.*

Appeal from Court of Common Pleas (HEUISLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Shirley Carter, for the appellant.

The Court declined to hear *E. A. Poe* and *S. H. Lauchheimer*, for the appellee.

URNER, J., delivered the opinion of the Court.

The main question presented by this record has been three times decided by this Court, and the conclusion it has reached and reiterated has been twice approved by the Supreme Court of the United States. It is now urged that the question be reconsidered upon the theory that its previous determination by this Court was erroneous in principle and that the Supreme Court misconstrued the decision it affirmed. This contention, while extraordinary, was argued with unquestionable sincerity and ability, and we have given care-

ful consideration to the reasons advanced in its support, but we see no occasion to doubt the soundness of the conclusion previously announced or to suppose that the Supreme Court was under any misapprehension as to the basis of the ruling it reviewed.

The case before us involves the collection of taxes alleged to have been lawfully levied by the appellee upon an assessment, duly made by the State Tax Commissioner, of certain distilled spirits in the custody of the appellant corporation in Baltimore City. The defense is predicated upon the alleged invalidity of the statutory provisions for the imposition of the taxes sought to be recovered. These provisions are embraced in sections 214 to 224 of Article 81 of the Code of Public General Laws, and they require, among other things, that the custodian of distilled spirits shall pay for the owner the taxes levied with reference to the property, but reserve a lien upon it as a means of reimbursement for the payment. This legislation is claimed to be in violation of Article 15 of the Declaration of Rights and of the "due process of law" clause of the Fourteenth Amendment of the Constitution of the United States. The supposed invalidity of the statute under the Federal Constitution is asserted to be due not to any inherent repugnancy to that instrument, but to certain limitations which this Court has recognized as having been imposed upon the taxing power of the State by its own organic law. The proposition is that inasmuch as Article 15 of the Declaration of Rights, as construed by this Court, permits taxes to be levied *in personam* but not *in rem*, and as the provisions in question have accordingly been held to contemplate the taxation of the *owner* of the assessed commodity, therefore the requirement compelling a mere custodian to pay such taxes, though allowing him a lien for his protection, is not a valid exercise of the power of taxation thus restricted, and amounts to the taking of property without due process of law. This theory involves the assumption, first, that the power to tax *in personam* can only

Md.]

Opinion of the Court.

be validly exerted *directly* against the owner of the assessed property, even though his identification, by reason of peculiar incidents of ownership, may be practically impossible, and, secondly, that even if a self-imposed limitation of the taxing power of a State does not invalidate a particular exercise of such power under the State Constitution, it may yet be capable of rendering an otherwise inoffensive statute obnoxious to the Constitution of the United States.

Upon full consideration of the specific objection just stated the validity of the statute in controversy was sustained in *Monticello Distilling Co. v. Baltimore City*, 90 Md. 416; *Fowble v. Kemp*, 92 Md. 637; *Carstairs v. Cochran*, 95 Md. 488; *Carstairs v. Cochran*, 193 U. S. 10; and *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285. In the case last cited the identical reasons now submitted for a reconsideration of the question were presented and ruled insufficient. It was there held that as the statute had been conclusively declared by this Court to be a valid exercise of taxing power under the Constitution of this State, and as it had been found in *Carstairs v. Cochran*, 193 U. S., *supra*, not to be in conflict with the Federal Constitution, there was no substantial or meritorious basis upon which the contention to the contrary could be predicated as a Federal question; and the appeal was dismissed upon that distinct ground. It would be difficult to conceive of a situation in which a litigated question could be more effectually concluded by repeated, careful and controlling adjudications than is the primary issue in the present case.

In the pleas filed to the declaration the defense we have stated was supplemented by the allegations that the owners of the distilled spirits were and are non-residents of Maryland, and are consequently not liable to taxation by this State, and that the defendant is a foreign corporation, whose only assumed obligation to the State was to pay the fee of twenty-five dollars prescribed by statute, and therefore cannot be

lawfully required to pay the taxes here attempted to be collected.

The first of these questions was considered in all of the cases above cited, except that of *Fowble v. Kemp*, and it was expressly held that the non-residence of the owner did not affect the legality of the tax.

The point as to the defendant's non-residence appears to be now specifically presented for the first time. It is argued that a corporation can only exist and reside in the State of its creation, although its existence may be *recognized* elsewhere, and that as the taxing statute in question can have no extra territorial effect, it cannot be enforced as against the non-resident defendant unless compliance with its terms has been made the subject of express agreement or has been stipulated as a condition of the right of foreign corporations to engage in business in this State. It is asserted that the defendant never expressly agreed to comply with the statute, and it is contended that the only conditions imposed upon its right to transact business in Maryland are those prescribed by sections 137 to 141 of Article 23 of the Code of Public General Laws of 1904, and that these require only that the business desired to be done shall be such as domestic corporations are permitted to conduct, that a certified copy of the charter be filed and certain information given, that an agent be designated upon whom process may be served, and that the sum of twenty-five dollars be paid to the State. These requirements having been fully performed and the defendant having become entitled to, and having received, a certificate as to its right to pursue its business in Maryland, it is insisted that this right is supported by a contract for a valuable consideration which is not subject to impairment by the exaction of the additional personal duty of paying taxes for the owner of the property in the defendant's custody.

The authorities cited to this proposition were *New York, Lake Erie, Etc., Co. v. State of Pennsylvania*, 153 U. S. 628, and *American Smelting Co. v. Colorado*, 204 U. S.

Md.]

Opinion of the Court.

103. In the first of these cases a New York railroad corporation constructed the portion of its road which extended into Pennsylvania under a statute of the latter State granting the right to do so in consideration of the payment of certain prescribed taxes on the property and stock of the company. A later statute required all foreign corporations in paying interest on their bonds to collect and account for taxes levied by the State on such of the securities as were held by resident bondholders. This requirement was held to be invalid, because, as the Supreme Court states: "It assumes to do what the State has no authority to do—to compel a foreign corporation to act, *in the State of its creation*, as assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania." In the *American Smelting Co. case*, a non-resident corporation entered the State of Colorado after compliance with a statute which provided that foreign corporations should be subject to all the liabilities and restrictions of domestic corporations, and it was held not to be legally subject to a higher tax sought to be imposed by a later Act in disregard of this rule of equality. These cases are quite different from the one at bar, and do not in our judgment support the contention that foreign corporations engaged in the distilling and warehouse business in Maryland should be held exempt from the statutory duty, imposed upon all corporations alike, to pay taxes validly levied with respect to property in their custody and within the limits of this State upon the security of a lien reserved for their protection.

But the appellant's summary of the statutory provisions subject to which it was admitted to this State has left out of consideration the very important and significant declaration in section 409 of Article 23 of the Code that: "Any corporation not chartered by the laws of this State which shall transact business therein shall be deemed to hold and exercise franchises within this State, and shall be liable to suit in any of the Courts of this State on any dealings or transactions

therein." Section 66 of Article 23 of the Code, enacted as part of the new corporation law by Chapter 240 of the Act of 1908 provides that: "No foreign corporation shall engage or continue in any kind of business in this State, the transaction of which by domestic corporations is not permitted by the laws thereof. And every foreign corporation doing business in this State shall be deemed thereby to have assented to all the provisions of the laws thereof." The obvious purpose of each of these provisions was that foreign corporations, so far as their activities in Maryland are concerned, should be subject to the control of the State, and be responsible for their transactions to the same extent as if they had been created under our own law. This is in accordance with the principle, as stated by this Court, that while "the comity exhibited by the several American States toward each other secures to a corporation created by any one of them almost the same use of its chartered powers and privileges in the territory of the others which it enjoys in the one that created it," yet that comity "is always extended to foreign corporations by the domestic State in such manner as to do no violence to its own policy." *Patapsco Co. v. Baltimore City*, 110 Md. 310.

If foreign corporations were exempt from the duty imposed generally upon custodians of distilled spirits to pay the taxes owing by the owner, the whole system of taxation, with reference to that class of property, would be deranged, and a large proportion of the revenue to which the State is entitled from that source would be rendered uncollectible.

The general rule is well settled that foreign corporations which are permitted to come into a State for the prosecution of their business must be held to have accepted the restrictions and duties imposed upon them by the laws of the State they enter, and they can claim no other or greater rights or privileges than those accorded to the domestic corporations. *Central Ga. R. R. Co. v. Eichberg*, 107 Md. 372; *Boggs v. Inter-American, Etc., Co.*, 105 Md. 371; *Note to Reeres v.*

Md.]

Opinion of the Court.

Southern Ry. Co., (Ga.) 70 L. R. A. 525; *Harding v. Amer. Glucose Co.*, 182 Ill. 551; *State v. U. S. Mut. Accident Asso.*, 67 Wis. 624; *Horn Silver Mining Co. v. State of New York*, 143 U. S. 315. In the case last cited the Supreme Court observed: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

We, therefore, hold that the fact of the appellant's incorporation in another State does not relieve it from the duty sought to be enforced in this suit.

The questions we have considered were presented on demurrer to the defendant's pleas relying upon the several defenses indicated. In the Court below the demurrer was sustained, and the defendant electing to stand upon the pleas, judgment was entered for the amount of the taxes claimed. The defendant now invokes the demurrer as mounting to the first error in pleading, to question the sufficiency of the declaration. This is said to be defective in not alleging that the taxes sought to be recovered from the defendant as custodian of the distilled spirits were levied upon an assessment of the property in the names of the respective owners. To sustain this contention would be to defeat the whole policy of our taxing system as to this class of property and ownership, because it is obviously impracticable to identify at any given time the holders of the negotiable warehouse certificates who own the spirits in storage. It was on account of this very difficulty that the plan of providing for payment of the taxes by the custodian, and reimbursement to him through a lien on the property, was devised. *Monticello Co. v. Baltimore City*, *supra*. It was argued that the law contemplated the assessment of the spirits to the owner by name, but we do not so understand its terms. While section 2 of Article 81 of the Code requires that all property of every kind and description within the State shall be valued and assessed to the respective owners, it is expressly provided in the same section that nothing contained in it or

in the article shall affect sections 214 to 224 inclusive relating to the taxation of distilled spirits. Those sections plainly indicate that the only name with which the assessing and taxing agencies are to be concerned in a case like the present is that of the "owner or proprietor of a bonded or other warehouse in which distilled spirits are stored," or of the "person or corporation having custody of such spirits."

In *Carstairs v. Cochran*, 95 Md., *supra*, the fundamental question as to the liability of a custodian to pay taxes under conditions identical with those existing in this case was raised upon demurrer to a declaration which, like the one before us, necessarily omitted an allegation that the assessment had been made in the name of the owners. The demurrer to the declaration in that case was overruled and the same ruling must be made in the case at bar.

There was no error in the judgment of the Court below, and it will be affirmed.

Judgment affirmed with costs.

Md.]

Syllabus

THE BALTIMORE AND OHIO RAILROAD COMPANY *vs.* EDWARD E. RUETER.

Replevin—Right of Possession—Bill of Lading Issued by Carrier for Goods Subsequently Received—Issue of New Bill of Lading by Connecting Carrier upon Surrender of First Bill Without Receipt of Goods—What is a Delivery to a Consignee—Rights of Endorsee of Bill of Lading—Bills of Exception—Remanding Cause.

To maintain an action of replevin, the plaintiff must show that he was entitled to possession of the property at the time of the issuing of the writ.

The fact that the plaintiff may have obtained naked possession of the goods prior to the issuing of the writ, of which he was afterwards deprived, does not show that he was entitled to possession at the time the writ was issued.

When the defendant in an action of replevin had first agreed to surrender the goods to the plaintiff and afterwards changed his mind, alleging a mistake as to plaintiff's right, that agreement does not show that the plaintiff was entitled to possession when the writ was issued.

When a bill of lading is issued by one carrier for goods before they were actually received, upon the faith of another bill of lading for the goods issued by a connecting carrier, the first-mentioned bill of lading operates on the goods when received, by way of relation and estoppel, and that bill is evidence of ownership.

The provisions of Code, Art. 14, which prohibit the issue of a bill of lading by a carrier until the goods have been actually received, is not to be construed as making void the subsequent delivery of goods by a shipper to comply with the bill of lading so issued before actual receipt.

When a carrier in possession of goods accepts from the consignee a surrender of the original bill of lading and issues another bill of lading for the goods to another destination, that transaction is equivalent to the delivery of the goods to the consignee.

On December 5th, the plaintiff in Virginia sold a carload of lumber to the S. Company in Baltimore, and delivered the same to the C. & O. R. Co., receiving therefor a bill of lading to Baltimore *via* that road and the B. & O. R. Co. He sent the bill to the S. Co. and placed in a bank a three days' draft for the price on the S. Co. On December 6th the S. Co. surrendered the bill of lading to the B. & O. R. Co. and received therefor an export bill of lading for the goods to a consignee in Liverpool, and on the same day endorsed that bill of lading to a bank, which paid the S. Co. therefor by discount of the draft attached to the bill. The B. & O. R. Co. received the lumber on December 8th. The S. Co. became insolvent on December 12th, and on that day plaintiff's draft on them for the lumber was protested for non-payment. December 14th, plaintiff notified the B. & O. R. Co. not to deliver the lumber to the S. Co. Subsequently the B. & O. R. Co. refused to deliver the lumber to the plaintiff, and he took the same from it under a writ of replevin. *Held*, that the plaintiff had parted with title to the lumber by delivery of the same to the C. & O. R. Co. and by sending the bill of lading to the S. Co., whose right to receive the goods was not affected by the fact that the bill of lading was marked "non-negotiable."

Held, further, that the S. Company's surrender of this bill of lading to the B. & O. R. Co. and that company's issue therefor of another bill of lading operated as a delivery of the lumber, and the title of the *bona fide* endorsee of the latter bill of lading to the property became effective at that time.

Held, further, that consequently the plaintiff is not entitled to maintain replevin for the goods.

The rulings of the trial Court on the several prayers for instructions presented to it is to be regarded as a single act, and may all be properly embraced in one exception. But

Md.]

Statement of the Case.

that same bill of exception should not also contain the rulings of the trial Court on motions to strike out evidence.

In this case, there was a judgment in the Court below for the plaintiff in an action of replevin which is reversed on appeal; but although it clearly appears that the plaintiff was not entitled to possession of the goods, judgment cannot be entered in this Court for the defendant, since the jury failed to ascertain by their verdict the value of the goods replevied, as is required by Code, Art. 75, sec. 117, and consequently the case must be remanded for that purpose.

Decided February 2nd, 1911.

Appeal from the Superior Court of Baltimore City (SHARP, J.).

Plaintiff's First Prayer.—If the jury find from the evidence that the plaintiff shipped the carload of lumber mentioned in the evidence in this case from Mechum's River, Virginia, to the Stirling-West Company at Locust Point, and that he sent a three-day sight draft for the purchase price to a national bank in Baltimore, if they so find, and if they shall further find that the Stirling-West Company accepted said draft and failed to pay the same, and became insolvent, and that thereupon the plaintiff came to Baltimore and demanded from the defendant the return of this carload of lumber, if the jury so find; and if they shall further find that at that time the goods were still in the possession of the B. & O. R. R., and had not been delivered to the Stirling-West Company, the plaintiff, or the witness McLean, secured to the satisfaction of the defendant, the B. & O. R. R. Company, the payment of the freight charges on said car of lumber, and that the agents and servants of the defendant gave the plaintiff possession of said car of lumber, then the verdict of the jury must be for the plaintiff, notwithstanding the fact that the jury may further find that the defendant

thereafter undertook to retake possession of said lumber. (*Granted.*)

Plaintiff's Second Prayer.—If the jury shall find from the evidence that the plaintiff delivered to the Chesapeake & Ohio Railway Company at Mechum's River in the State of Virginia, the carload of lumber referred to in the evidence in this case, for transportation to Locust Point, Baltimore, Maryland, and received from said Railway Company a bill of lading issued at Mechum's River drawn to the order of the Stirling-West Company, marked not negotiable, and sent said bill of lading to said Sterling-West Co.

And if they shall further find that the plaintiff made a three-day sight draft on Stirling-West Company and sent it to said Stirling-West Company through his bank, and that said Stirling-West Company accepted said draft, but failed to pay the same.

And if they shall further find that before delivery of said carload of lumber to said Stirling-West Company said company became insolvent, and before it had received said carload of lumber the said plaintiff notified the defendant, the Baltimore & Ohio Railroad Company, of his desire to exercise, and did exercise, his right of stoppage in transitu, then the verdict of the jury must be for the plaintiff, notwithstanding the fact that the jury may further find that the Baltimore & Ohio Railroad Company had issued a foreign bill of lading for said lumber, upon which it had incurred liability; provided, the jury shall further find that the said Baltimore & Ohio Railroad Company issued said foreign bill of lading before the carload of lumber had actually been received by the said B. & O. R. Co. for transportation. (*Granted.*)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, THOMAS, PATTISON and URNER, JJ.

Duncan K. Brent and *Allen S. Bowie*, for the appellant.

Md.]

Opinion of the Court.

Charles A. Marshall (with whom was *Redmond C. Stewart* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appeal in this case is from a judgment in favor of the plaintiff, the appellee, in an action of replevin against the Baltimore and Ohio Railroad Company, the appellant, and the receiver of Stirling-West Company to recover "a car of lumber." The receiver of Stirling-West Company did not defend the suit, and judgment by default was rendered against him, but the appellant filed four pleas in which it alleged: 1, that it did not take the property of the plaintiff; 2, that at the time of the issuing of the writ the property in the goods and chattels mentioned in the declaration was in the defendant; 3, that at the time of the issuing of the writ the property in said goods and chattels was "in Churchill and Sim, England;" and, 4, that at the time of the issuing of the writ the plaintiff had no property in said goods and chattels. Issues were joined on the first and fourth pleas, and replications were filed to the second and third pleas asserting property in the plaintiff.

The undisputed facts of the case are as follows: The appellee, Edward E. Rueter, trading as Diamond Lumber Co., who was engaged in the wholesale Lumber business in Basic City, Virginia, on the fifth of December, 1905, sold to Stirling-West Company, of Baltimore, a lot of lumber, and on the same day delivered the lumber to the Chesapeake and Ohio Railway Company at "Mechum's River," Virginia, and received from said railway company a bill of lading for the transportation, over its own line and via the Baltimore and Ohio Railroad, and delivery of the lumber to the order of Stirling-West Company, at Locust Point, Baltimore, Maryland. The appellee sent the bill of lading which was marked "not negotiable," to Stirling-West Company, and deposited in the Basic City Bank a three-days' draft on said consignee for the price of the lumber. Stirling-West Company re-

ceived the bill of lading, and on the 6th of December surrendered it, properly endorsed, to the freight agent of the Baltimore and Ohio Railroad Company in Baltimore, and requested and received from the appellant a "through export" negotiable bill of lading to the order of Stirling-West Company, Liverpool, England, for the lumber described in the bill of lading issued by the Chesapeake and Ohio Railway Co. On the same day Stirling-West Company presented the bill of lading issued by the appellant, properly endorsed, to the First National Bank of Baltimore, and procured through said bank, from the Fourth Street National Bank of Philadelphia, a draft on Churchill and Sim, London, for sixty pounds, which amount was credited by the First National Bank of Baltimore to the account of Stirling-West Company. This draft, with the bill of lading attached, was received and purchased by the Fourth National Bank of Philadelphia on the 8th of December, and was transmitted by said bank to Churchill and Sim, who paid the draft and received the bill of lading. The car containing the lumber was delivered by the Chesapeake and Ohio Railway Co. to the Baltimore and Ohio Railroad Company at Staunton, Virginia, on the eighth of December. Stirling-West Company became insolvent on the 12th December, and on the 14th of December the appellee received notice that Stirling-West Company had accepted his draft, and that the draft had been protested on the 12th of December. The appellee thereupon requested the Chesapeake and Ohio Railway Company to stop delivery of the lumber, and that company immediately notified the appellant not to deliver it to Stirling-West Company. On the 16th of December the appellee went to Baltimore for the purpose of securing the lumber, and upon his arrival in Baltimore met Mr. McLean who agreed to purchase the lumber for the price at which it was sold to Stirling-West Company, if the appellee could give him good title to it. They learned that the car containing the lumber was at Locust Point, and then went to see Mr. Lewis, freight claim agent of the appel-

Md.]

Opinion of the Court.

lant. Mr. Lewis was not at his office, but his clerk told him that the appellant had received a communication from the Chesapeake and Ohio Railway Company in regard to the lumber, and that he would let him know about it the next morning. The next day they went to Mr. Lewis' office again and met the same clerk who told the appellee that he could have the lumber. They then went to Locust Point, where they met one of the clerks connected with the freight office of the appellant at that point, and Mr. McLean asked him to charge the freight to him and said that he would pay it when he got the lumber. The clerk agreed to charge the freight to Mr. McLean, and the appellee and Mr. McLean then got into the car and were engaged in taking marks off and putting Mr. McLean's brand on the lumber when the agents of the appellant notified them that they, said agents, had made a mistake, that a through bill of lading had been issued for the lumber, and that the appellee could not have it. The appellant refused to deliver the lumber to the appellee, and it was subsequently taken under the writ of replevin in this case and delivered to the appellee, who immediately sold it to Mr. McLean for \$292.00 which was paid at the request of the appellee to the American Bonding Company, surety on the replevin bond. As Churchill and Sim did not receive the property described by the bill of lading issued by the appellant and delivered to them, the appellant was required to reimburse them to the extent of \$299.74.

Issues having been joined on the replication alleging property in the plaintiff, in order to recover it was incumbent upon him to show that at the time of the issuing of the writ he was entitled to the possession of the property. 1 *Poe's P. & P.* (3rd ed.), secs. 251 and 253; *Cullum v. Bevans*, 6 H. & J. 469; *Warfield et al. v. Walter et al.*, 11 G. & J. 80; *Benesch v. Weil*, 69 Md. 276.

The appellee contends that the appellant delivered the lumber to him on the 17th of December, and that he was therefore entitled to the possession of the property at the

time the suit was brought. But even assuming that what was said and done on that day amounted to a delivery of the property to the appellee, if the appellee was not entitled to the possession of the lumber at that time, and the appellant, after discovering its mistake, refused to surrender it, the fact that there had been such a delivery could not affect the question of the appellee's right to the possession at the time the writ was issued. When the suit was brought the lumber was in the possession of the appellant, and was taken from the appellant under the writ. In order to justify that taking the burden was on the appellee to show that he was then entitled to possession, and he can not establish his title by showing that at some time previous to the issuing of the writ he obtained the naked possession of the property without any right thereto.

As the bill of lading delivered by the appellant to Stirling-West Company was issued on the 6th of December, before the appellant received the lumber which was delivered to it by the Chesapeake and Ohio Railway Company on the 8th of December, the appellee further contends that under the provisions of Article 14 of the Code, which prohibit the issue of bills of lading by carriers until the goods and chattels described therein have been received by them, the bill of lading issued by the appellant was void, and that the appellee's right to the possession of the lumber was not affected by the issuing of said bill of lading or by its subsequent endorsement and delivery by Stirling-West Company to said Banks and to Churchill and Sim. The appellee relies on the case of *Aetna Nat. Bank v. Water Power Co.*, 58 Mo. App. 523. In that case the bill of lading was issued by the Kansas City, Ft. Scott & Memphis Railway Co. for property that was not in its possession at the time and that was never received by it, and in a suit by the holder of the bill of lading against the original vendor, who had recovered possession of the property at its destination from the Atchison, Topeka & Santa Fe Railway Co., the Court said: "Plain-

Md.]

Opinion of the Court.

tiff's title is founded upon a fraudulent, void and unlawful bill of lading issued in the face of the prohibition of the statute and it in consequence has no title or right to the possession which could support a judgment in its favor."

In the case at bar, while the lumber was not in the possession of the appellant at the time its bill of lading was issued to Stirling-West Company, it was received by the appellant on the 8th of December, and from that time it became the property of the endorsee of said bill of lading. CHIEF JUSTICE SHAW said in *Rowley et al. v. Bigelow et al.*, 12 Pick. 306: "The bill of lading acknowledges the goods to be on board, and regularly the goods ought to be on board before the bill of lading is signed. But if, through inadvertance or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipowner's warehouse, or in the shipper's own warehouse, at hand and ready, and afterwards they are placed on board, as and for the goods embraced in the bill of lading, we think, as against the shipper and master, the bill of lading will operate on these goods by way of relation and by estoppel."

In the case of the "*Idaho*," 93 U. S. 575, the bill of lading was issued by the master of the brig "Colson" to Forbes, the shipper, for one hundred and forty bales of cotton before the cotton had been delivered to the "Colson." Several days after the date of the bill of lading, and after Forbes had secured from Porter & Co. a large sum of money on the bill of lading, Forbes delivered the cotton to the "Colson" and it was receipted for by the officers of the brig. The cotton was placed on the wharf, and before it was taken on board the brig, Forbes removed it from the wharf and shipped it by steamship to New York. In reference to Porter & Co.'s title to the cotton, the Court said: "It is not only the utterance of common honesty, but the declaration of judicial tribunals, that a delivery of goods to a ship corresponding in sub-

stance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery. At that instant it becomes evidence of the ownership of the goods. * * * We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship which will prevail over the master's bill, but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods. The cotton delivered on the 8th of April on the pier for the "Colson," and received by the mates of the brig became, therefore, at the instant of its delivery, the property of Porter & Co., who were then the indorsces of the bills of lading. Its subsequent removal by Forbes to the "Ladona," either with or without the consent of the brig's officers, could not divert that ownership.

"There is nothing in the Statutes of Louisiana which requires a different conclusion. Those statutes prohibit the issue of bills of lading before the receipt of the goods, but they do not forbid curing an illegal bill by supplying goods, the receipt of which have been previously acknowledged. The statutes are designed to prevent fraud. They are not to be construed in aid of fraud, as they would be if held to make a delivery of goods to fill a fraudulent bill of lading inoperative for the purpose. The title of Porter & Co. to the one hundred and forty bales must, therefore, as we have said, been held to have been perfected when they were delivered to the "colson" on the 8th of April."

Apart from the authorities cited as to the effect of the receipt of the lumber by the appellant on the 8th of December, section 6 of Article 14 of the Code declares that such a bill of lading shall "be conclusive evidence in the hands of any *bona fide* holder for value, who became such without actual notice to the contrary," etc., that the goods described therein were "actually received and actually in possession" of the

Md.]

Opinion of the Court.

carrier, and section 9 of said Article provides that "No person having any claim, right or action whatever under this article or otherwise upon or under any instrument declared negotiable thereby, or by reason of the issuing, negotiation or holding of said instrument, or the doing of any matter or thing by this Article forbidden or made punishable, shall be in any way hindered or precluded from asserting or maintaining the same by or because of any prohibitory or punitive provision in this article contained." It follows from what we have said that the learned Court below erred in granting the plaintiff's first and second prayers, which present the contentions of the appellee to which we have referred.

In the case of *Bank of Bristol v. B. & O. R. R. Co.*, 99 Md. 661, this Court said: "A bill of lading represents the goods described in it. 6 *Cyc.* 426. Bills of lading by the law merchant are representatives of the property for which they have been given, and the endorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods, *divests the vendor's lien.* * * * But though the vendor's lien is thus divested by reason of the complete delivery of the *indicia* of property, he may, if the goods have not yet reached the actual possession of the buyer, *and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer*, intercept the goods in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage *in transitu.*"

These principles have been so long established and have been so generally recognized that it is not necessary to cite other authorities. When the appellee sold the lumber and delivered it to the Chesapeake and Ohio Railway Company for transportation and delivery to the order of Stirling-West Company at Baltimore under the circumstances disclosed by the undisputed evidence, he parted with his title to the property. The bill of lading issued by said railroad com-

pany in the possession of Stirling-West Company as consignee, was evidence of Stirling-West Company's title to the lumber and of its right to receive the property from the appellant when it came into the possession of the appellant. This right of Stirling-West Company to receive the lumber from the appellant was not affected by the fact that the bill of lading was marked "not negotiable." Stirling-West Company did not attempt to transfer its title to the lumber by an assignment of the bill of lading to a third party, but surrendered it, properly endorsed to the appellant. If, at that time, the property had been in the possession of the appellant, Stirling-West Company could, subject to the payment of any proper charges for carriage, etc., have exacted delivery of the lumber, but instead of waiting until the lumber had been received by the appellant, and then demanding delivery, Stirling-West Company requested the appellant to re-bill the lumber to another point, and the appellant issued and delivered to Stirling-West Company a negotiable bill of lading therefor to "Shipper's order, Liverpool, England," which bill of lading, we have said, became effective on the 8th of December, and was evidence of the endorser's title to the lumber. In the *Bank of Bristol case, supra*, CHIEF JUDGE McSHERRY says that where a carrier in possession of the property, at the request of the consignee and upon surrender of the original bill of lading, re-bills the property to another point, it amounts to a delivery of the property to the consignee, and the same statement is made in the case of *Midland National Bank v. Mo., Kan. & Texas R. R. Co.*, 62 Mo. App. 531.

But we are not required in this case to determine what would have been the right of the appellee if the appellant had received notice not to deliver the lumber to Stirling-West Company before the property came into its possession or before Stirling-West Company had endorsed and delivered the bill of lading issued by the appellant to the banks

Md.]

Opinion of the Court.

or to Churchill and Sim for value, for here the appellee did not attempt to stop the delivery of the property until after the 14th of December, and after the title to the property had become vested in the endorsee of the bill of lading issued by the appellant. It is therefore clear on the admitted facts of the case that the appellee was not entitled to the possession of the lumber, and that as the burden was on him to establish his right to the possession, the defendant was entitled to an instruction directing a verdict in its favor.

The appellee filed a motion to dismiss the appeal on the ground that there is but one bill of exceptions embracing exceptions to the rulings of the Court below on seven motions to strike out evidence admitted subject to exceptions and on the prayers. In the case of *Ellicott v. Martin*, 6 Md. 509, the Court said: "We * * * are of opinion that each distinct exception, which embraces an independent proposition of law, should be signed and sealed by the Court below, before it can be regarded as a valid exception. This remark does not apply to a series of consecutive prayers offered by the counsel. In such a case the ruling of the Court, in either granting, rejecting or modifying the prayers, may be regarded as a single act, and one exception, if properly taken and executed, may embrace the whole." In the case of *Tall v. Steam Packet Co.*, 90 Md. 248, there were several exceptions to rulings of the Court below on the evidence and one to its rulings on the prayers included in one bill of exception, and CHIEF JUDGE McSHERRY said: "This is an unusual and erroneous way to present such essentially distinct propositions. The ruling on each question should form the subject of a separate exception." In the case of *Acker, Merrill & C. Co. v. McGaw*, 106 Md. 536, four exceptions were embraced in one bill of exceptions, and the Court, while expressing its disapproval of that mode of presenting questions reserved for review, refused to dismiss the appeal on that ground. In the still later case of *Junkins v. Sullivan*, 110 Md. 539, where several exceptions to rulings on the evidence

were included in one bill of exceptions, this Court refused to consider the exceptions, and CHIEF JUDGE BOYD said: "After that recent warning and statement of the law on a subject, we do not feel called upon to review the rulings thus improperly presented to us by those exceptions." In neither of these cases were the irregularities referred to regarded as sufficient ground for a dismissal of the appeal, and the motion in this case must be overruled. But as the ruling on the prayers may be regarded as a single act, and may be embraced in one exception, where exceptions to other rulings are included in the same bill of exceptions they cannot be treated as valid exceptions, and only the exception to the ruling on the prayers will be considered.

In the view we have taken of the case it would not be necessary, however, to consider the questions raised by these exceptions even if they had been properly presented, nor is it necessary to review the ruling of the Court below on the defendant's prayers.

For the error in granting plaintiff's prayers, the judgment of the Court below must be reversed, and as the material facts of the case are not disputed and clearly show that the appellee was not entitled to the possession of the property replevied, judgment would be entered for the appellant but for the fact that the value of the property replevied was not ascertained by the jury as required by section 117 of Article 75 of the Code, and the further fact that there is no sufficient evidence in the record from which this Court can determine its value. The case will, therefore, have to be remanded in order that the value of the property replevied may be ascertained by a jury, unless the parties can agree to such value, and a judgment may be entered for appellant in accordance with the provisions of said section of the Code.

Judgment reversed with costs, and case remanded for the purposes stated in this opinion.

INDEX.

ACTS OF ASSEMBLY.

See TABLE OF STATUTES IN FIRST PART OF VOLUME.

AGENCY.

See BROKERS.

APPEAL.

1. Payment of cost of record.

An appeal will not be dismissed merely because the appellant failed to pay the cost of printing the record within ten days after receipt of notice from the Clerk of the Court of Appeals, as is required by Rule 34, if the record was in fact printed and ready when the cause was called for argument in regular order. *German Union Ins. Co. v. Cohen*, 130.

2. Instruction not referring to pleadings.

When a granted prayer does not refer to the pleadings, its correctness must be determined entirely by a consideration of the evidence. *Commercial Realty Co. v. Dorsey*, 172.

3. From order quashing writ of summons.

Upon appeal from an order quashing a writ of summons, it is not necessary that there should be a bill of exceptions, when the record contains the motion to quash, the answer, and the affidavits filed, and shows what questions were decided by the trial Court. *Long v. Hawken*, 234.

4. Appeal Dismissed for Delay in Transmission of Record.

Rule 16 of this Court provides that an appeal will not be dismissed for failure to transmit to this Court the record on appeal within the prescribed time of three months from the date of the appeal, if the appellant makes it appear that the delay was caused by the negligence or omission of the Clerk of the Court below or of the appellee. In this case, more than six months elapsed between the entry of the appeal and the transmission of the record. This delay was not caused by the Clerk of the trial Court. The appellant alleged that the appellee retained in his possession a typewritten copy of the

APPEAL—Continued.

evidence and thus prevented him from preparing the bill of exceptions. The appellee obtained possession of the copy of the evidence more than three months before the transmission of the record. *Held*, that under these circumstances, the appeal should be dismissed. *Duvall v. Md. Elec. Rys. Co.*, 298.

5. Inconsistent contentions.

In an action to recover damages for the killing of the plaintiff's horses while being driven over a railway crossing, the declaration stated that the driver was the servant of the plaintiff and was using ordinary care at the time of the accident, and at the trial, the plaintiff asked that the question of the driver's contributory negligence should be submitted to the jury. *Held*, that, on appeal, the plaintiff will not be heard to say that the driver was not his servant, and the horses were not being used in his business at the time of the injury, and that therefore he was not responsible for the negligence of the driver. *Brehm v. P., B. and W. R. Co.*, 302.

6. In condemnation cases.

The question whether a railway company has the right under its charter to condemn certain land for an addition to its roadbed is a matter exclusively within the jurisdiction of the Court to which the inquisition is returned, and no appeal lies from its action in the premises. *St. James' Church v. B. and O. R. Co.*, 442.

7. Confused record.

When the record on appeal is so confused by a colloquy between the trial Court and counsel that this Court cannot determine the point to which an exception relates, it must be held that there was no reversible error in the ruling. *Hanrahan v. Baltimore City*, 517.

8. Bill of exceptions.

The rulings of the trial Court on the several prayers for instructions presented to it is to be regarded as a single act, and may all be properly embraced in one exception. But that same bill of exception should not also contain the rulings of the trial Court on motions to strike out evidence. *Balto. and Ohio R. Co. v. Rueter*, 687.

APPEAL—*Continued.***9. Remanding cause.**

In this case, there was a judgment in the Court below for the plaintiff in an action of replevin which is reversed on appeal; but although it clearly appears that the plaintiff was not entitled to possession of the goods, judgment cannot be entered in this Court for the defendant, since the jury failed to ascertain by their verdict the value of the goods replevied, as is required by Code, Art. 75, sec. 117, and consequently the case must be remanded for that purpose. *Balto. and Ohio R. Co. v. Rueter*, 687.

ASSIGNMENT.

See **INSURANCE**, 4.

ASSOCIATIONS.

See **GIFTS**, 3.

ASSUMPSIT.

See **CONTRACTS**, 3.

BANKS AND BANKING.**1. Payment of check in ignorance of insolvency of drawer, indebted to the bank.**

If a bank pays a check drawn on it by a depositor at a time when it has claims against him greater than his deposit and in ignorance of the fact that the depositor had then become insolvent and that receivers had been appointed for him, the bank is not entitled to recover the amount of the check from the payee on the ground that the payment was made by reason of a mistake of fact. As between the holder of the check and the bank, the transaction is closed when the payment is made. *Nat. Exchange Bank v. Ginn & Co.*, 181.

BILL OF LADING.**1. Issued by carrier for goods subsequently received—Rights of endorsee of bill—What is delivery to consignee.**

When a bill of lading is issued by one carrier for goods before they were actually received, upon the faith of another bill of

BILL OF LADING—*Continued.*

lading for the goods issued by a connecting carrier, the first-mentioned bill of lading operates on the goods when received, by way of relation and estoppel, and that bill is evidence of ownership. *Balto. and Ohio. R. Co. v. Rueter*, 687.

2. The provisions of Code, Art. 14, which prohibit the issue of a bill of lading by a carrier until the goods have been actually received, is not to be construed as making void the subsequent delivery of goods by a shipper to comply with the bill of lading so issued. *Ibid.*
3. When a carrier in possession of goods accepts from the consignee a surrender of the original bill of lading and issues another bill of lading for the goods to another destination, that transaction is equivalent to the delivery of the goods to the consignee. *Ibid.*
4. On December 5th, the plaintiff in Virginia sold a carload of lumber to the S. Company in Baltimore, and delivered the same to the C. & O. R. Co., receiving therefor a bill of lading to Baltimore *via* that road and the B. & O. R. Co. He sent the bill to the S. Co. and placed in a bank a three days' draft for the price on the S. Co. On December 6th the S. Co. surrendered the bill of lading to the B. & O. R. Co. and received therefor an export bill of lading for the goods to a consignee in Liverpool, and on the same day endorsed that bill of lading to a bank, which paid the S. Co. therefor by discount of the draft attached to the bill. The B. & O. R. Co. received the lumber on December 8th. The S. Co. became insolvent on December 12th, and on that day plaintiff's draft on them for the lumber was protested for non-payment. December 14th, plaintiff notified the B. & O. R. Co. not to deliver the lumber to the S. Co. Subsequently the B. & O. R. Co. refused to deliver the lumber to the plaintiff, and he took the same from it under a writ of replevin. *Held*, that the plaintiff had parted with title to the lumber by delivery of the same to the C. & O. R. Co. and by sending the bill of lading to the S. Co., whose right to receive the goods was not affected by the fact that the bill of lading was marked "non-negotiable." *Ibid.*

BILL OF LADING—Continued.

5. *Held*, further, that the S. Company's surrender of this bill of lading to the B. & O. R. Co. and that company's issue therefor of another bill of lading operated as a delivery of the lumber, and the title of the *bona fide* endorsee of the latter bill of lading to the property became effective at that time. *Ibid.*
6. *Held*, further, that consequently the plaintiff is not entitled to maintain replevin for the goods. *Ibid.*

BILLS AND NOTES.**1. Action against acceptor of bill—Special plea alleging fraud.**

In an action against the acceptor of a bill of exchange, a special plea on equitable grounds, alleging that the defendant's acceptance had been obtained by fraudulent representations, is defective in that it fails to charge that the plaintiff had notice of the alleged fraud, and also because the defense of fraud in such case is admissible under the general issue plea. *Stouffer v. Alford*, 110.

2. Burden of proof to show good faith.

When the maker or acceptor of a negotiable instrument in an action against him by the holder produces evidence to show that his signature was obtained by fraud, the burden of proof is then cast upon the plaintiff to show that he acquired the instrument before maturity, for value, and without notice of any defect or fraud. *Stouffer v. Alford*, 110.

3. Evidence of fraud—Instructions to the jury.

Defendant was induced to agree to give a trial order for certain jewelry and to accept drafts for the price, upon the faith of representations made to him that articles of that kind were to be furnished to only one other dealer in the city; that they were of first-class quality and would last for twenty years; that the seller guaranteed the sale of enough of the jewelry during the coming season to pay for all of it, and that the seller would buy back at cost price, at the end of the year, any goods left on defendant's hands. *Held*, that evidence that these representations were made and that they were false, is admissible in an action upon the acceptances, to show that they were obtained by fraud, and such evidence, if found to

VOL. 114 45

BILLS AND NOTES—*Continued.*

be true by the jury, is sufficient to justify a verdict for the defendant. *Stouffer v. Alford*, 110.

4. In an action against the acceptor of a bill of exchange, the jury was properly instructed at the instance of the defendant, that in determining whether or not his signature was procured by fraud, the jury were to consider all of the circumstances concerning the transaction given in evidence, and if the jury found that the agent of the drawer of the bill represented to the defendant at the time of the sale of the goods for which the bill was drawn and accepted that the drawer was the manufacturer of the goods; that they were of fine quality and guaranteed to wear for twenty years; that goods of that kind would be sold to only one other dealer in the city, and that if the jury found that similar goods were sold to other merchants, and that they were practically worthless, the jury may infer that defendant's signature was obtained by fraud, and if they so find their verdict should be for the defendant. *Ibid.*
5. *Held*, further, that a prayer offered by the plaintiff was properly rejected which instructed the jury that a failure by the seller to fulfil his promises would not constitute fraud in procuring the acceptance of the draft. This prayer segregates a single circumstance from others closely related. *Ibid.*
6. *Held*, further, that the plaintiff in this case did not ratify the contract of sale and waive his right to claim that his acceptance of the draft had been procured by fraud by keeping the goods and offering them for sale. *Ibid.*

BROKERS.

1. Real estate broker not entitled to commissions when he is interested in the purchase made—When broker the procuring cause of sale.

A real estate broker employed to sell land who has himself an interest in the purchase is not entitled to recover commissions on such a sale unless the vendor knew that the broker was purchasing in part for himself and assented to the arrangement. The duty of the broker as agent of the vendor is to obtain the highest price and his personal interest as a

BROKERS—*Continued.*

purchaser is to buy at the lowest price. He cannot be allowed compensation for his services in effecting a sale when there is such a conflict between his duty as an agent and his personal interest as purchaser. *Slagle v. Russell*, 418.

2. Plaintiff sued to recover commissions on the sale by defendants of a farm to one C. The defendants did not know at the time that C. had been procured as a purchaser by the plaintiff. Some months before the sale, the defendants had authorized plaintiff to obtain an offer for the property. Plaintiff's evidence was that he had first called C.'s attention to the farm and asked him to buy it, and afterwards said that if C. so wished he would unite with him in making the purchase. The defendant's evidence was that the plaintiff's proposition to C. was that they should buy the farm together, and that this was not agreed to by C., who some time afterwards bought the farm directly from the defendants. *Held*, that, assuming that the plaintiff was the procuring cause of the sale, if it be found as a fact by the jury that the plaintiff called C.'s attention to the farm by the proposition that they should buy the same on joint account, the plaintiff is no more entitled to commissions on the sale afterwards made to C. alone than he would be if the sale had been made to them jointly. *Ibid.*
3. *Held*, further, that the evidence in the case is legally sufficient to show that plaintiff's proposition to C. was not essentially that they should become joint purchasers, and also to show that the plaintiff was the procuring cause of the sale afterwards made, and that these questions should have been submitted to the jury under instructions in connection with the defendant's evidence. *Ibid.*
4. If a broker who has been authorized to obtain a purchaser for land is the procuring cause of the sale afterwards made because he first called the attention of the purchaser to the property, he is entitled to commissions on the sale, although the vendor did not know that the purchaser to whom he sold had been procured by the efforts of the broker. *Ibid.*
5. When a broker empowered to sell a farm becomes the procuring cause of a sale made five months after his employment,

BROKERS—*Continued.*

the offer to him will not be held, as matter of law, to have lapsed by efflux of time, so that his acceptance, by performing the services contemplated, comes too late to make a contract entitling him to commissions. *Ibid.*

6. After negotiations begun through a broker's intervention have virtually culminated in a sale, he cannot be discharged so as to deprive him of his commissions when he was thus the procuring cause of the sale made. *Ibid.*

CARRIERS.

See BILL OF LADING.

CEMETERIES.

See EMINENT DOMAIN, 1.

CONSTITUTIONAL LAW.

1. **Power of Governor to suspend civil officers pending trial of charges against them—Power of Governor to make temporary appointment in place of officer suspended.**

The Act of 1900, Chap. 15, authorizes the Governor to appoint, by and with the advice and consent of the Senate, three persons to constitute the Board of Police Commissioners for Baltimore City, who shall hold office for the term of two years. The Constitution, Art. 2, sec. 15, provides: "The Governor may suspend or arrest any military officer of the State for disobedience of orders or other military offense, and may remove him in pursuance of the sentence of a court-martial; and may remove for incompetency or misconduct all civil officers who receive appointment from the Executive for a term of years." No other power of removal is given to the Governor by statute or by the Constitution, and no express power to suspend civil officers. The Constitution of 1776 did authorize the Governor to suspend, as well as to remove, civil officers, but the power to suspend was omitted from the Constitution of 1851, and the present Constitution. *Held*, that the Governor has no express power to suspend the Police Commissioners appointed by him with the consent of the Senate, pending the trial of charges against them of incompe-

CONSTITUTIONAL LAW—*Continued.*

teney and misconduct, and that no such power can be implied from the existence of the power to remove for cause after trial. *Cull v. Whittle*, 58.

2. *Held*, further, that since, under Constitution, Art. 2, sec. 11, the Governor has the power to appoint to the office of Police Commissioner, during the recess of the Senate only in case of a vacancy occurring in the office, and since the suspension of such officer does not create a vacancy, the Governor has no implied power to make a temporary appointment to the office, pending the investigation of charges against a Commissioner. *Ibid.*

3. **Change in remedy given to creditors of corporation against stockholders by Act 1908, Chap. 305.**

Prior to the Act of 1908, Chap. 305, each creditor of a corporation was entitled to bring an action at law against any stockholder therein who had not fully paid his subscription for the stock, and the creditor could recover from him to the extent of the balance due on the stock subscription. The Act of 1908, Chap. 305, provided that the liability of stockholders to creditors of the corporation should be enforced only by bill in equity on behalf of all the creditors against all the stockholders. After the passage of this Act, plaintiff instituted suit against the defendants to enforce their liability for unpaid subscriptions for the capital stock of the corporation of which the plaintiff was a creditor. *Held*, that this Act is constitutional and did not impair the obligation of the contract within the meaning of the Federal Constitution, since it afforded to the creditors of the corporation a more efficient remedy against the stockholders than that which previously existed. *Bettendorf Co. v. Field*, 487.

4. *Held*, further, that the existing rights of the creditors of the corporation against stockholders were not affected by the general corporation law, Act of 1908, Chap. 240, which contained a provision expressly reserving their rights against stockholders. *Ibid.*

See TAXATION, 1.

CONTRACTS.

1. **Liability of party inducing a person to commit breach of contract to that person—Evidence—Instructions.**

The person who unlawfully or maliciously causes one of the parties to a contract to break it is liable in damages to the person who is thus made to break his contract for the loss he suffers in consequence of such unlawful act. *Sumwalt Co. v. Knickerbocker Co.*, 403.

2. In an action to recover damages suffered by the party who was compelled by the threats of the defendant to break his contract with a third person, it is no defense that he was also a wrongdoer by breaking his contract, and that by the suit he is seeking to take advantage of his own wrong. *Ibid.*
3. Plaintiff, a dealer in ice, made a contract with the defendant company, an ice manufacturer, for the purchase of ice for two years, at a varying scale of prices. Those for the months from June to October, 1908, were \$2.25 per ton. Each party agreed not to sell to, or interfere with, the customers of the other. In June, 1908, plaintiff made a contract with a dairy company to sell to it ice at \$5.00 per ton. The defendant company then notified the plaintiff not to sell to the dairy company, which was not a customer of the defendant, and threatened that if plaintiff did so defendant would not supply in the future. There was at that time a scarcity of ice, so that plaintiff could not obtain a supply except from the defendant. In consequence of this notice and threat, the plaintiff was obliged to break his contract with the dairy company, and the defendant sold ice directly to the dairy at \$5.00 per ton, and the plaintiff lost the profit he would have made under his contract with the dairy company. In an action to recover damages for the loss so occasioned, *held*, that the notice and threat of the defendant company, which obliged the plaintiff to refrain from carrying out his contract with the dairy, was an unlawful act causing the damage to the plaintiff for which he is entitled to recover. *Ibid.*
4. *Held*, further, that the fact that the plaintiff could have bought ice from other persons does not defeat his right to maintain the action; nor is the plaintiff a joint tortfeasor with the defendant. *Ibid.*

CONTRACTS—*Continued.*

5. In such action, evidence is admissible to prove the contract between the plaintiff and the dairy company. *Ibid.*
6. Goods bought to be delivered and paid for in instalments—
Right to rescind for defective delivery—Delay in rescission—Waiver.

When a contract calls for the delivery of certain goods in monthly instalments, each instalment to be paid for monthly, the failure of the buyer to pay for an instalment as stipulated entitles the seller to rescind the contract as to future deliveries, and the failure of the seller to make delivery of an instalment, or the substitution of inferior goods in a delivery, entitles the buyer to rescind the contract. It makes no difference whether such breach of the contract occurs at the beginning of the performance or afterwards. *Enterprise Mfg. Co. v. Oppenheim*, 368.

7. The right of a buyer to rescind a contract for the purchase of goods to be delivered in instalments, if inferior goods had been substituted in a delivery, is not waived or lost unless he delays for an unreasonable time in notifying the seller of his purpose to rescind after he acquires knowledge of the defects in the delivery; nor is the right to rescind lost because the buyer made use of such defective goods before having knowledge of the defect. *Ibid.*
8. Defendants agreed to buy nearly two million yards of plain sheetings of a designated size and weight, to be manufactured by the plaintiff company, under a contract which, as subsequently modified, provided that two hundred and fifty thousand yards should be delivered in each month, in equal weekly instalments according to buyer's shipping directions, which were to be paid for within a designated time. It is customary for buyers of such goods, which are known in the trade as grey goods, to send them to a finishing mill to be bleached and processed, or converted, or printed. When such goods go from the manufacturer to the finishing mill, the only inspection usual or practicable is made at the mill manufacturing them, and no inspection of the bales is made at the finishing mill before beginning to process. Defects in such sheetings consist of drop threads, thick and thin places,

CONTRACTS—Continued.

misweaves, oil stains, etc. These defects are magnified in processing and greatly diminish the value of the finished product. The plaintiff company made four shipments of the sheetings mentioned in the contract to the finishing mill, when defendant notified them that they cancelled the contract on account of defects just discovered in the goods already shipped. Defendants had at the time paid for the last three shipments which had been processed, but had not used the first shipment. This they offered to return. Plaintiff company claimed in this action the contract price for the goods already made and the balance due on the goods delivered and damages for defendant's breach of the contract. *Held*, that the evidence shows that the defects in the sheetings delivered were such that the goods did not comply with the contract, which called for sheetings known in the trade as "firsts". *Ibid*.

9. *Held*, further, that this failure to deliver the kind of goods called for entitled the defendants to rescind the contract. *Ibid*.
10. *Held*, further, that this right to rescind was not lost or waived because the defendants had caused the goods contained in three of the shipments to be processed, since the defects in them were not discovered until after the processing had taken place, and the defendants acted with reasonable promptness after the discovery of the defects. *Ibid*.
11. *Held*, further, that consequently the plaintiff company is not entitled to recover in this action. *Ibid*.
12. **Promise made on condition not performed.**

Plaintiff, who had a contract for the services of a jockey in riding his race horses during certain years, transferred the contract and the right to the services of the jockey to the defendant under an agreement which provided as conditions of its efficacy that the jockey's father should consent to the transfer and that it should also be approved by a Jockey Club. In consideration of the transfer, defendant gave to plaintiff a promissory note for \$500. In an action on the note, *held*, that since the father of the jockey had refused his assent to the transfer and it had not been approved by a Jockey Club, the plaintiff is not entitled to recover. *Townes v. Cheney*, 362.

CONTRACTS—*Continued.*

13. When no recovery on quantum meruit.

Held, further, that the plaintiff is not entitled to recover on a *quantum meruit* for two months' services rendered by the jockey to defendant, since the special contract sued on had not been performed, or abandoned by the parties, or its performance prevented by the defendant. *Townes v. Cheney*. 362.

14. Failure of title to property sold.

A party who has no title to property sold by him cannot recover on the single bill given for the purchase money. *Disharoon v. Waters*, 456.

15. In an action upon a writing obligatory under seal for the payment of a sum of money, a plea on equitable grounds states a good defense when it alleges that the single bill was given in consideration of the transfer to the defendant of certain oyster lots, which the plaintiff represented as being situated in the State of Maryland, and that he had a right to transfer under the laws of Maryland, but that in fact the lots were situated in the State of Virginia, and the plaintiff had no right to transfer the same. In such case, a Court of equity would enjoin the prosecution of a suit or the enforcement of a judgment on the writing obligatory, and consequently the plea is good by way of equitable defense. *Ibid.*

16. Action for services rendered to decedent—Instructions.

In an action to recover for services rendered to a decedent, a prayer offered by the plaintiff told the jury that if they found that the decedent promised to pay the plaintiff thirty dollars per month for the work performed by him, or promised to pay him for the work, and shall also find that thirty dollars per month was a reasonable and just compensation for the work performed, then their verdict may be for the plaintiff for such sum as the jury may find to be due for the work. *Held*, that this prayer does not contain conflicting propositions, since the plaintiff would be entitled to recover upon either alternative, according as the jury found that the one or the other was supported by the evidence. *Huff v. Simmers*. 548.

CONTRACTS—Continued.

17. *Held*, further, that this prayer is not in conflict with a prayer granted at the instance of the defendant which instructed the jury that if the decedent did not have a license during the period in which the services sued for were rendered, they might consider that fact in determining the question whether the business in which the services were alleged to have been rendered was conducted by her. *Ibid*.

18. Voluntary payment.

A person is not entitled to recover money paid for another's benefit unless paid at the request of the latter. *Huff v. Simmers*, 548.

19. Construction by acts of the parties.

When the language of a contract is uncertain the acts and conduct of the parties may be considered to discover the meaning of the language used, but the parties cannot testify as to their understanding or interpretation of the contract. *Diamond v. Shriver*, 643.

20. Rescission by buyer after part performance—Recoupment in action for price.

A contract for the purchase of lumber of specified kinds at designated prices provided that in case the seller should fail to supply any of the material within three days after a request, thereupon the agreement should become void and the buyer liable only for the price of lumber delivered down to and including the day of the stoppage of deliveries. In an action to recover the price of lumber delivered to the defendant before his cancellation of the contract under this clause and also the price of certain lumber delivered to and accepted by the defendant thereafter, *held*, that the defendant is not entitled to recoup damages arising from delay in the delivery of lumber before cancellation of the contract. *Commercial Realty Co. v. Dorsey*, 172.

21. *Held*, further, that a prayer offered by the defendant is erroneous which instructs the jury that, if they find the contract was cancelled, then the plaintiff is not entitled to recover for any lumber not delivered down to the date of the cancellation. This prayer submits to the jury to find whether the contract was duly cancelled, which is a question of law, and

CONTRACTS—*Continued.*

also it denies the right of the plaintiff to recover for the lumber supplied thereafter and accepted by the defendant. *Ibid.*

22. Action on note given for services in securing options on shares of stock—Original contract waived—Consideration.

Defendants, being desirous of obtaining the controlling interest in the stock of an insurance company, made a contract with the plaintiff by which the latter agreed to secure options on the greater part of the stock at \$15 per share, which were to be taken up by the defendants. The contract did not provide expressly for any payment to the plaintiff for his services, but the parties expected at the time that the plaintiff would be able to get fifty-one per cent. of the stock of the company for about \$12.00 per share, and would be compensated by being paid the difference between that sum and \$15 per share, which was to be paid by the defendants. Afterwards, the plaintiff found himself unable to secure the stock at that price, but was obliged to pay \$15 a share for the options in addition to a commission of brokers. The defendants participated in this new arrangement, but did not take up all the options, and in other respects the original contract was changed. Before defendants had acquired the full amount of stock necessary for the control of the company, the plaintiff demanded compensation for his services and threatened to turn over his own shares of stock to the opposing faction in the company. Defendants agreed to pay \$7,000, part of which was paid in cash and a note given for the balance, upon which the action in this case was brought. Defendants alleged that the note was procured by fraud and by duress, and also that it was without consideration. *Held*, that the evidence does not show that the defendants were misled by any false representations of fact made by the plaintiff at the time the note was given to him. *Dickson & Tweeddale v. Fowler*, 344.

- 23. *Held***, further, that the promise to pay the plaintiff for his services in obtaining the options was not without consideration, since, when he found that the stock could not be procured at the price estimated at the time the original contract was made, he had a right to refuse to perform further serv-

CONTRACTS—*Continued.*

ices unless the defendants would pay for the same, and the evidence shows that the note was given for services to be thereafter rendered by the plaintiff in securing control of the company for the defendants. *Ibid.*

24. *Held*, further, that the fact that the defendants feared that unless they agreed to give the note, the plaintiff would not transfer to them the shares of stock he himself owned, and would not pay a debt due to the corporation in question by a third party, which debt the plaintiff had guaranteed, did not constitute duress or undue influence. *Ibid.*

25. Duress.

A contract is not voidable for duress because the promisee threatened not to carry out another contract with the promisor unless it was made. *Dickson & Tweeddale v. Fowler*, 344.

See BROKERS.

INFANTS, 1.

SPECIFIC PERFORMANCE.

VENDOR AND PURCHASER.

CORPORATIONS.

1. Release in equity of lien of preferred stock.

Code, Art. 23, sec. 408, formerly provided that corporations having power to issue bonds secured by a mortgage should have the power to issue preferred stock, which should constitute a lien on the franchises and property of the corporation, and have priority over any subsequently created mortgage or other encumbrance. No provision was made in the statute for the release of the lien of the stock on the property of the corporation. After a corporation had issued several thousand shares of preferred stock, which were held by several hundred persons, it contracted to sell a lot of ground which it owned at the time of the issue of the stock, and which was subject to the statutory lien. The purchaser objected to the title. Upon a bill for specific performance against him and some of the preferred stockholders, to which bill the trustee under a prior mortgage of the property of the corporation was a co-plaintiff, *held*, that the lien of the preferred stockholders may be discharged as to any particular

CORPORATIONS—Continued.

part of the corporate property under a decree of a Court of Equity passed in a proceeding in which fairly selected representatives of that class are made parties, and in which the reasonable necessity for a sale is alleged and proved after suitable provision is made for the protection of the lienors with reference to the appropriation of the proceeds. *Levinness v. Consol. Gas Co.*, 559.

2. Foreign corporations.

Foreign corporations which are permitted to carry on their business in this State are held to have accepted the restrictions and duties imposed by the laws of this State, and they can claim no other or greater rights than those accorded to domestic corporations. *Hannis Distilling Co. v. Baltimore City*, 678.

3. The provisions of Code, Art. 23, secs. 137 to 141, relating to the conditions under which a foreign corporation may be allowed to do business in this State, do not operate to exempt a foreign corporation doing a warehouse business here from the general law regulating all warehouse companies. *Ibid.*

See CONSTITUTIONAL LAW, 3.

GIFTS, 3.

LIFE ESTATES, 3.

COSTS.

See VENDOR AND PURCHASER, 1.

DAMAGES.

1. Diminution of market value of land from railroad tracks in street.

When the laying of an additional railway track in a street cuts off access to the land of an abutting owner, he may recover damages therefor upon proof of a diminution in the market value of his land without proof of a diminution in its rental value. *Webb v. Balto. and Ohio R. Co.*, 216.

2. In action for injury to land from removal of support in mining.

When the injury to the plaintiff's land and house caused by the defendant's wrongful act in removing the subjacent support

DAMAGES—Continued.

is permanent in its nature, the measure of damages is the diminution in the market value of the property, and not the cost of repairing it, when such cost would be greater than the diminution in value, or when the repairing of the house would be practically impossible. *Piedmont Coal Co. v. Kearney*, 496.

See **CONTRACTS**, 1.

DEEDS.**1. Restriction on land conveyed—Waiver of restriction—Condition subsequent.**

A corporation which owned a large tract of land conveyed three parcels of it to L. by a deed, containing this restriction in the habendum clause: "Provided, however, that the property herein mentioned shall be used only for residence purposes and that each dwelling erected thereon shall not cost less than four thousand dollars, and further provided that no liquors shall be sold on the premises." L. conveyed one of these lots to S. subject to the same restriction, but conveyed his other lots to other purchasers without any restrictions. The corporation conveyed several portions of said tract to different persons without any restriction, and subsequently the remaining part of its property was sold under a mortgage foreclosure without restriction. The purchaser of the lot so conveyed to S. objected to the title on the ground that it would be subject to restriction contained in the said deed. *Held*, that there is nothing in the language of the deeds to indicate that any other persons than the grantors therein would have the right to enforce the restriction, and since these two grantors no longer have any interest in other parts of the land, the restriction could not be enforced by them; that there is no evidence that the restriction was imposed in pursuance of a general scheme for the improvement of the land, or that the land granted was to be made subject to any easement or restriction in favor of the land retained, and that consequently the purchaser of the lot conveyed as aforesaid to S. can now obtain a title free from the restriction. *Foreman v. Sadler's Executors*, 574.

DEEDS—*Continued.*

2. Grant of land binding on centre of existing private road—
When grantee takes subject to easement of way—
Closing the road.

The grantee of land described as including one-half of an existing private road, then in open use by other parties, acquires only a fee in the road subject to the easement of way. *Dinneen v. The Corporation, etc.*, 589.

3. When the owner of land which is crossed by a private way of his own, conveys a lot described as extending to the centre of the road, the grantee takes a fee to the centre, and the grantor owns the other half in fee, while the grantee by implication takes a right of way over the half retained by the grantor, subject to a like right in the latter over the half conveyed. *Ibid.*
4. Defendant, the owner of a tract of land, conveyed a portion of it to one F., and there was then made a private roadway leading through the land retained by the grantor to the part conveyed to F. While this roadway was not the only means of access to F.'s tract, it was reasonably necessary for the same, and was an open and visible easement. Afterwards the defendant grantor conveyed to the plaintiff lots of ground described as including one-half of said roadway. Plaintiff built a fence across one-half of the road as described in his deed, which was removed by the defendant. Upon a bill asking for an injunction to restrain such interference, *held*, that as between the defendant and F. the latter was entitled to an easement in the road, and that the title acquired by the plaintiff was subject to this visible easement, and the plaintiff is therefore not authorized to close the road, but owns the fee in it subject to the right of way over it possessed by F. and by the abutting owners on the opposite side of the roadway. *Ibid.*
5. *Held*, further, that no question of dedication is involved in the case. *Ibid.*

See MINES AND MINING, 3.

DESCENT AND DISTRIBUTION.

See DEVISE AND LEGACY, 1.

DEVISE AND LEGACY.**1. Gift to those entitled as heirs and distributees—First cousins entitled to exclusion of children of deceased first cousin.**

When a testator gives his estate to those persons who would be entitled thereto under the laws of the State as his next of kin and heirs at law, and he leaves surviving him first cousins and the children of a deceased first cousin, no evidence is admissible to show that he intended that a share of his estate should go to the children of the deceased first cousin, such children not being entitled under the Statute of Distribution to take as heirs at law or next of kin. *Suman v. Harvey*, 241.

2. A devise to the heirs of the testator is held to mean those persons who answer that description at the time of the death of the testator. *Ibid.*

3. Under Code, Art. 46, sec. 27, relating to the descent of real estate, and Art. 93, sec. 129, relating to the distribution of the personal property of decedents, no representation among collateral kindred is allowed after brothers' and sisters' children. And upon the death of a person intestate leaving as his nearest relations certain first cousins, and also the children of another first cousin who died before the testator, these latter do not take by representation the share of their deceased parent, but the whole estate, real and personal, passes to the first cousins. *Ibid.*

4. Construction of a devise—Termination of trust—Perpetuities.

A testatrix devised certain property to a trustee, with power to sell and reinvest, and directed him to pay the income to P. during life, but in case P. should not abstain from his intemperate habits, the trustee was directed to withhold the rents and profits and to invest same. Upon the death of P. the trustee was directed to hold the property or its proceeds and the rents and income directed to be invested for the use and benefit of certain named charitable and religious corporations, "the annual rents, profits, interest and income of which I desire to be equally divided among and paid to said institutions as same is received by said trustee." *Held*, that it was not the intention of the testatrix that the trustee, after the

DEVISE AND LEGACY—*Continued.*

death of P., should pay the income of the trust property to the charitable institutions; that the income referred to in the gift to them was the income accumulated during the life of P. and not paid to him; that the trust created by the will ceased upon the death of P., and consequently no perpetuity was created, and that it was then the duty of the trustee, in addition to the *corpus* of the estate, to pay over to the charitable institutions, any profits and income not paid by him to the life tenant. *Colburn v. Union Prot. Infirmary*, 94.

5. Declarations of testator.

Evidence of the declaration of a testator as to his purpose in making his will, or as to what persons would take under it, is inadmissible to affect the construction of the will. *Suman v. Harvey*, 241.

6. Legacy payable if legatee arrives at certain age contingent, and defeated by his prior death.

A testator devised his real estate to his wife for life and at her death to his two sons. He then charged the land devised to the sons with the payments to be made by them as follows: The said sons shall each pay at the death of the life tenant to the testator's daughter Sallie the interest on \$1,000 annually during her life. At the death of Sallie, the sons shall each pay the said interest to Sallie's son Walter until he has reached the age of twenty-four, "and upon the said Walter arriving at the age of twenty-four years, provided he arrives at that age after the death of his said mother, or if the said Walter is twenty-four years of age at the death of his mother, then each of my said two sons shall pay the sum of \$1,000 to the said Walter." Sallie and Walter both died before the life tenant, and Walter at the time of his death was twenty-one years old. Upon a bill by the heirs at law of Walter to enforce payment of the legacy to him as a charge on the land, *held*, that the legacy did not vest upon the death of the testator, but the same was contingent upon Walter's living until the age of twenty-four, and since he died at the age of twenty-one, the plaintiffs as his heirs are not entitled to the legacy. *High v. Pollock*, 580.

DEVISE AND LEGACY—Continued.**7. Absolute gift afterwards declared to be held in trust—Rule against Perpetuities.**

A testator, after the termination of a life estate therein given to his wife, gave one-fourth of his estate to each of his three daughters, and the other one-fourth part to two named grandchildren. He then provided that a certain store should not be sold until after the death of his last surviving daughter, and until his youngest grandchild should become of age; that then it should be sold and the proceeds divided equally among his grandchildren. By a subsequent clause of the will, he provided that the legal title to all of the property bequeathed should be held by two trustees for the remaindermen. *Held*, that the gift of one-fourth of the estate to the two grandchildren is to be construed in connection with the subsequent clause of the will, by which the testator declared his will and wish that all the property should be held in trust, and that therefore, this one-fourth part is to be held in trust until the time appointed for sale and distribution. *Gerke v. Colonial Trust Co.*, 289.

8. *Held*, further, that the provision directing that the store should not be sold until after the death of the last surviving daughter of the testator and the coming of age of his youngest grandchild is valid, and not repugnant to the nature of the estate previously given to the testator's named grandchildren. *Ibid*.

9. *Held*, further, that this provision does not violate the Rule against Perpetuities, since the grandchildren must be born within a life in being at the death of the testator. *Ibid*.

See LIFE ESTATES.

DIVIDENDS.

See LIFE ESTATES.

DURESS.

See CONTRACTS, 24.

EASEMENTS.

See DEEDS, 4.

EMINENT DOMAIN.

1. **Condemnation of part of private cemetery.**

A railroad company with general powers of eminent domain has the right to condemn for its use the unoccupied part of a private cemetery owned by a religious corporation. *St. James' Church v. B. and O. R. Co.*, 442.

2. The provisions of Code, Art. 23, sec. 133, relating to the opening of streets and roads through the property of any cemetery company incorporated under said Article, do not apply to a tract of land owned by a religious corporation, part of which is used as a private cemetery. *Ibid.*

3. **Restriction as to width of railroad.**

The charter of the Baltimore and Ohio Railroad Company authorized it to construct a railroad not exceeding 66 feet wide. *Held*, that this restriction is as to the width of the road, and not as to the width of the land that it may be found necessary to take for the purpose of relocating the tracks. *Ibid.*

EQUITY.

1. **Bill to cancel contract for fraud.**

Plaintiffs, as partners, bought 250 of the 300 shares of a Foundry Company from the defendants, and after the business had been turned over to them filed the bill in this case asking that the contract be annulled on the ground of false statements made by the defendants concerning the business of the company. These statements were that the Foundry Company did an annual business of a certain amount; that a trial balance submitted to the plaintiffs showed a certain annual profit, and that the defendants would furnish to the company a certain amount of business monthly. Upon an examination of the evidence it is *held*, that these allegations are not sustained; also that the contract between the parties was made before the trial balance was produced; that the books of the company, which fully disclosed all of its affairs, were within the control of the plaintiffs before the transaction was completed, and that consequently the plaintiffs are not entitled to the relief asked for. *Latrobe v. Dietrich*, 8.

EQUITY—Continued.**2. Testimony in rebuttal.**

A party to an equity cause should not be allowed to testify in rebuttal as to matters which were alleged in the bill as the principal ground of the relief asked for, and concerning which he could have given his testimony in chief before the evidence of the defendant was taken. *Latrobe v. Dietrich*, 8.

3. General exception to testimony.

When a part of the testimony of a witness in an equity cause relates to transactions had with a deceased person and is incompetent, and a part of the testimony relates to other matters and is competent, a general exception to all of the testimony of the witness, or a motion to strike out all of it, without designating the particular portions objected to, is properly overruled. *Russell v. Carman*, 25.

4. Trustees' sale vacated—Lower bid accepted after offer of higher price.

A decree of a Court of Equity authorized trustees to sell certain real estate at either public or private sale. The property was first offered at auction, and was withdrawn when the highest bid was \$1,700. Afterwards negotiations for a purchase were begun by the appellee, who offered \$1,500. The trustees wrote that they would accept that offer upon the receipt of a certain deposit. Before a deposit was made and before a definite agreement to sell to the appellee, the trustees received the offer of a higher price for the land from a responsible bidder. Afterwards the appellee paid the deposit and the trustees reported a sale to him for ratification. Upon exceptions thereto by a person interested in the proceeds, *held*, that since the sale reported was made by the acceptance of a lower bid in preference to a higher offered prior thereto, the sale should be vacated. *Neale v. Peverley*, 198.

5. Jurisdiction of Court of Equity to decree release of lien on preferred stock—Representation in equity of parties having a common interest.

The mere circumstance that the instrument creating a lien on corporate property makes no provision for releasing it does not prevent a Court of Equity from releasing it when it is shown to be to the advantage of the parties concerned

EQUITY—*Continued.*

and when precautions are taken to safeguard their rights.
Leviness v. Consol. Gas Co., 559.

6. To the general rule that all persons interested must be made parties to a proceeding in equity by which their rights may be affected, there is an exception in the case when the parties interested in certain property are numerous, and it is impossible to bring them all before the Court. In such case, if a sufficient number of the persons interested are brought into Court, so as to be fairly representative of the large class having common interest, the decree made will bind all of them. *Ibid.*

7. **Bill to vacate transfer of money made by decedent.**

A bill in equity by an administrator alleged that the defendant, who had been the agent of the deceased intestate, obtained from him in his lifetime a check for upwards of \$4,000, the proceeds of which the defendant had converted to his own use; that at the time the check was obtained the deceased was an old man, incapable of managing his affairs, and that the money had been procured by undue influence and fraud. *Held*, upon an examination of the evidence, that these allegations are not sustained, but that the proof shows that the gift to the defendant was the free and unconstrained act of the decedent, and that he was at the time capable of making a valid contract. *Stouffer v. Wolfkill*, 603.

8. **Answer after demurrer overruled.**

When a demurrer to a bill asking for an injunction is overruled, the Court should not at once issue the writ in final and absolute terms, but should afford the defendant an opportunity to file an answer. *Didier v. Merryman*, 434.

EVIDENCE.

1. **As to location of property.**

When the question is whether certain oyster lots sold by the plaintiff to the defendant were within the State of Maryland or in the State of Virginia, a witness may be asked where the lots are located, where the line runs between the two States in the waters where the oyster grounds in question were situated, and what was recognized by the com-

EVIDENCE—*Continued.*

munity generally as the dividing line between the two States. *Disharoon v. Waters*, 456.

2. Hearsay testimony and evidence of general reputation are admissible to show what the boundaries of land are. *Ibid.*
3. To show injury to land from removal of subjacent support in mining coal.

When the plaintiff has shown that his land, from under which defendant removed coal, cracked in many places; that cracks and crevices also appeared in the walls of the dwelling house, barn, etc., evidence is admissible to show what the market value of plaintiff's house was before it was damaged, and its value afterwards, and what injuries the removal of the coal had occasioned. *Piedmont Coal Co. v. Kearney*, 496.

4. Hearsay.

The testimony of a witness as to what a certain person said to him is hearsay. *Sumwalt Co. v. Knickerbocker Co.*, 403.

5. *Res gestae*.

Evidence of the declarations of a party made more than six months after the commission of the wrong complained of are not part of the *res gestae*. *Sumwalt Co. v. Knickerbocker Co.*, 403.

6. In action by son against mother's estate for services.

In such action, evidence is admissible to show that the plaintiff had presented a claim against his father's estate, and had said at the death of his mother that he had no claim against her estate. *Huff v. Simmers*, 548.

7. Evidence is also admissible to show that the plaintiff's mother had paid to him certain sums of money in her lifetime, in connection with other evidence tending to show the relation between the parties, and that this payment would ordinarily be made in compensation for services performed. *Ibid.*

8. Newspaper report of market prices.

The newspaper report of the market prices of goods and stocks is admissible in evidence to show such prices when it is proved that the newspaper is accepted by the persons dealing in those things as trustworthy in stating the market prices. In such case, it is not necessary to show how the newspaper obtained the information so published. But if a newspaper

EVIDENCE—*Continued.*

is not recognized by the trade as furnishing reliable statements concerning the market prices, there must be evidence to show how its published information as to the particular market price was obtained, before it can be admitted in evidence. *Jones v. Ortel*, 205.

9. In action for injury to house caused by negligent construction of sewer.

In an action where the question is whether the defendant was guilty of negligence in the construction of a trench and sewer, expert witnesses cannot be allowed to give their opinion that, from the facts stated in the questions to them, the defendants had not exercised due care. That was a matter for the determination of the jury. *Hanrahan v. Baltimore City*, 517.

10. In an action for injury to a house, evidence that certain repairs would put the house in as good a condition as it was before the injury is competent; as is also evidence concerning the effect on the value of the house of putting iron anchors or braces in it. *Ibid.*
11. In an action to recover damages caused to plaintiff's house by the construction of a trench and sewer alongside of it, a witness may be asked how long the trench remained open and why the sewer was constructed at that particular point. *Ibid.*
12. A witness qualified as an expert in digging sewer trenches may be asked what effect the standing of rain water in the trench would have on the lagging, and he may also be asked whether a certain sewer should have been built in sections or opened for its entire length. *Ibid.*
13. When the question is whether a sewer was negligently constructed or not, a witness cannot give his opinion that it ought to have been made on the opposite side of the alley, for negligence in the location of the sewer is as much a question for the jury as whether there was negligence in the details of its construction. *Ibid.*
14. When part of the negligence charged against the defendant is that a water pipe crossing a sewer trench was broken, a witness cannot be asked, "Do you know what causes a breakage

EVIDENCE—Continued.

in a case of that sort." The question is too broad and vague. *Ibid.*

15. Nor can the witness be asked, "Is there any ordinary method commonly adopted to prevent this breakage, which by W.'s testimony was shown not to have been done." The first part of this question is proper, but there is no evidence to support the assumption in the latter part. *Ibid.*

16. In an action charging the negligent construction of a sewer which injured plaintiff's house, a witness may be asked, "What would be the effect of water standing in a trench of eight feet depth upon the lagging, and also upon the foundation of the adjoining house?" *Ibid.*

17. Relevancy and competency in general.

In an action to recover for services rendered in obtaining for the defendants the controlling interest in the stock of an insurance company, the evidence as to the States in which that company did business, or as to what services the plaintiff rendered to another company, is irrelevant. *Dickson & Tweedale v. Fowler*, 344.

18. In such action, the admission of evidence as to what contracts were made by the company after the defendants obtained control of it is not prejudicial error. *Ibid.*

19. A witness cannot be allowed to state his opinion as to the true construction of a written contract. *Ibid.*

20. Letters written by a party to a cause which are mere *ex parte* statements in his own interest are not admissible in evidence. *Ibid.*

21. In an action to recover for services rendered by the plaintiff, evidence is admissible to show that the original contract relating to such services was abandoned and that they were rendered in pursuance of another agreement. *Ibid.*

22. When the defendant alleges that the promissory note sued on was obtained by fraud, a letter from the defendant to the plaintiff, written after the transaction in question, expressing confidence in the plaintiff, is admissible in evidence. *Ibid.*

23. When a certain document has been admitted in evidence, a party is entitled to read to the jury certain parts of it which he deems material. *Hanrahan v. Baltimore City*, 517.

EVIDENCE—Continued.

24. A question is improper which assumes without proof that the defendant omitted to do something which ought to have been done. *Ibid.*

· See CONTRACTS, 5.
DEVISE AND LEGACY, 5.
EQUITY, 2.
MASTER AND SERVANT, 2.
NEGLIGENCE.

EXECUTORS AND ADMINISTRATORS.

1. **Authority of Orphans' Court to authorize executor to compromise suit against estate.**

The mere passing of a claim against the estate of a deceased person in the Orphans' Court, or its allowance there in the *ex parte* account of an executor, does not prevent parties in interest from contesting it. *Badders v. O'Brien*, 451.

2. The Act of 1908, Chap. 428, provides that the Orphans' Court shall have power to authorize any executor or guardian to compromise any claim against or in favor of the estate of any decedent or ward in such manner as the said Court may approve. *Held*, that this Act does not confer upon the Court full power to determine the validity and amount of a creditor's claim against the estate of the decedent or ward, but its decision in regard to such claim will be upheld in the absence of positive error. *Ibid.*
3. In this case, an executor was authorized to compromise a suit against the estate, in which \$15,000 was claimed for services rendered to the testator, by the payment of the sum of \$1,000, and he was also allowed a counsel fee of \$500. An *ex parte* account was passed in the Orphans' Court making these allowances, to which account a legatee excepted. After testimony was taken, the Orphans' Court dismissed the exceptions, and the legatee appealed. *Held*, upon consideration of the evidence, that the action of the Orphans' Court in authorizing the compromise of the suit and in allowing the counsel fee should be affirmed. *Ibid.*

FRAUD.**1. Delay in avoiding contract procured by fraud.**

One who is induced by the fraud of another to make a contract is put to an election, when he discovers the fraud, either to avoid the contract or to abide by it. If he elects to avoid, he must act within a reasonable time after discovering the fraud; and if thereafter he deals with the subject-matter as his own property he cannot disaffirm the contract. *Latrobe v. Dietrich*, 8.

2. Deed vacated for fraud.

Plaintiff alleged that she was induced to execute a deed by reason of the false statement made to her by her niece that she was witnessing her sister's will. The effect of the deed was to reduce the interest of the plaintiff in certain real property from a fee simple to a life estate. *Held*, that the allegations of the bill are sustained by the evidence and that consequently the deed should be annulled and set aside. *Russell v. Carman*, 25.

See **BILLS AND NOTES**, 3.

EQUITY, 1.

GAS COMPANIES.

See **NEGLIGENCE**, 2, 3.

GIFTS.**1. Gift of savings bank deposit placed in name of donor in trust for herself and donee.**

A woman who had certain sums of money on deposit in two savings banks caused the deposits to be transferred to her name in trust for herself and her granddaughter, joint owners, subject to the right of either, the balance at the death of either to belong to the survivor. A few months afterwards the granddaughter drew out most of the money and deposited it in another bank in her own name only. The grandmother filed the bill in this case alleging that she intended to retain the use of the money during her lifetime, and only designed that the granddaughter should get it at her death, to be distributed in accordance with private instructions. The granddaughter answered that the change

GIFTS—*Continued.*

in the deposit had been made with the consent and upon the advice of her grandmother. The latter died pending the suit. The evidence in the case is held to show that the grandmother intended that the money in question should belong to her granddaughter at her death; that no fraud or undue influence had been exercised upon her; that the withdrawal from the bank was made with her knowledge, and that now the granddaughter is entitled to the fund. *Mulfinger v. Mulfinger*, 463.

2. Gift inter vivos to unincorporated association for charitable purposes.

An executed transfer of shares of stock, made by way of gift *inter vivos*, to an unincorporated association is valid, although the association is composed of an uncertain and fluctuating membership, who do not have a common interest in the property. *Snowden v. Crown Cork, etc., Co.*, 650.

3. The owner of shares of stock in a corporation caused the same to be transferred on the books of the company and a new certificate issued in the name of Mrs. U., "treasurer of the Baltimore branch of the Woman's Foreign Missionary Society, or any other future treasurer of said branch." The donor before making delivery of the certificate to the treasurer wrote on it as follows: "I have transferred and given to Mrs. U., the treasurer of the Baltimore Branch of the Woman's Foreign Missionary Society, all my interest in the within certificate of seventy shares of stock, only reserving the payment of the dividends, to be paid by Mrs. U. or any succeeding treasurer of said Branch to Mrs. M. during the term of her natural life, after her decease the stock to be kept and held by said treasurer in trust and dividends all devoted to the Madison Avenue Auxiliary Branch of said society." Both the Baltimore branch and the auxiliary here mentioned are voluntary unincorporated associations which send the money they collect to the Woman's Foreign Missionary Society, which is incorporated. After the death of the life tenant the shares of stock were claimed by the administrator of the deceased donor. *Held*, that the gift of the shares had been consummated; that the donee had capacity to accept the same; that, as there was no intention to create

GIFTS—Continued.

a trust, the Rule against Perpetuities was not violated, and that consequently the gift is valid. *Ibid.*

GUARANTY.**1. Original undertaking.**

When a party promises to pay for work to be done for another, that constitutes an original undertaking and is not a promise to pay another person's debt. *Huff v. Simmers*, 548.

HIGHWAYS AND STREETS.**1. Laying of railroad tracks in public street.**

When the construction of railroad tracks in a public street destroys or impedes access to the land abutting thereon, the landowner is entitled to recover damages for such injury, since his right to the use of the street for access to his land is a property right. *Webb v. Balto. and Ohio R. Co.*, 216.

2. In such case it is not necessary for the landowner to prove that the rental value of the property has been diminished by the railroad tracks, but he is entitled to recover for a diminution in its market value. *Ibid.*

INFANTS.**1. Executed contract.**

An infant and an adult, as partners, bought certain property, and afterwards filed a bill to vacate the contract on the ground of fraud. The evidence fails to show that any fraud was practiced; and since the infant plaintiff had enjoyed the benefit of the contract, which was executed, he cannot recover from the defendant any part of the money paid by the partnership. *Latrobe v. Dietrich*, 8.

INJUNCTIONS.**1. Injunction to restrain interference with drain pipe—Possession and use of drain sufficient without proof of title.**

A party in possession of land and of drain pipes used in connection therewith is entitled to an injunction restraining a trespasser from interfering with the drain or making use of it. In such case it is not necessary that the plaintiff's title

INJUNCTIONS—*Continued.*

to the land should be fully stated in the bill, nor that evidence of the title should be filed as an exhibit. Nor is it necessary for the plaintiff to allege that he was the owner of the drain. If his right to it is only an easement, it is entitled to protection. *Didier v. Merryman*, 434.

2. Plaintiff's bill alleged that she had been in possession of a certain house and lot for a long time and had used in connection with it a drain pipe, running down the middle of an alley in the rear of the lot, for the purpose of carrying off sewage and water; that the drain had been built for the exclusive use of plaintiff's house and certain adjoining properties; that it was insufficient in size for this purpose and had frequently become choked so that the water and refuse from it was backed up on plaintiff's lot, which was lower in grade than the other houses using the drain, with one exception; that the defendant was the owner of a house on the opposite side of said alley and, without any right so to do, had made a connection with said drain pipe and discharged into it water from his house; that this wrongful act exposed plaintiff to an increased danger of overflow from the drain. The bill asked for an injunction. *Held*, that a demurrer to the bill was properly overruled and that the plaintiff is entitled to the relief asked for, since injury from defendant's wrongful act may reasonably be anticipated, and an action at law would not afford an adequate remedy. *Ibid*.

INSOLVENCY.

See BANKS AND BANKING, 1.

INSURANCE.

1. Fire—Misrepresentation as to ownership—What constitutes false swearing avoiding policy.

A policy of fire insurance was issued to the plaintiff on household furniture, wearing apparel of family, sewing machine, etc. The policy provided that it should be void if the insured had concealed or misrepresented any material fact concerning the insurance, or if the interest of the insured in the property be not duly stated, or if the interest of the insured be other than unconditional and sole ownership. *Held*,

INSURANCE—*Continued.*

that the fact that the sewing machine and certain clothing, covered by the general terms of the policy, did not belong to the plaintiff, but to his wife, is not such a misrepresentation of ownership as renders the entire policy void. *German Ins. Co. v. Cohen*, 130.

2. In plaintiff's proof of loss, verified by affidavit, he stated that among the articles injured by fire of which he was the owner were certain pieces of women's clothing and a sewing machine. At the trial of the cause, he stated that he had given to his wife the money to buy the sewing machine. *Held*, that this affidavit does not avoid the policy under a clause in it providing that in case of any fraud or false swearing by the insured, touching any matter relating to the insurance, whether before or after loss, the policy should be void. *Ibid.*
3. Under a provision of a policy of fire insurance stating that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, a misstatement under oath as to the ownership of part of the property insured does not avoid the policy when it was not believed by the insured to be false and was not made with the intent to defraud. *Ibid.*
4. **Validity of assignment of life insurance policy to creditor.**

At a time when A. was indebted to B., and when it was contemplated that further advances would be made, a policy of insurance on the life of A. was issued. In pursuance of an agreement previously made, A. assigned this policy to B. in absolute terms, and the assignment stated that "this transfer is not made for the purpose of securing any indebtedness or as collateral security, but with the intent and for the purpose of divesting the assignor of all title to and interest in said policy." The premiums on the policy were paid by B., and their payment was a part of the consideration of the assignment. At the time of A.'s death he was indebted to B. in the sum of \$1,029. The amount of the policy was \$2,500, and it was claimed both by B. and the administrators of A. *Held*, that B. had an insurable interest in the life of A.; that the policy was issued for his benefit as a creditor; that the assignment was a *bona fide* business transaction, and not a device to cover a wagering contract on the life of A.; that

INSURANCE—*Continued.*

the assignment is not invalidated by the statement in it that it was not for the purpose of securing an indebtedness, and that B. is now entitled to the entire proceeds of the policy. *Fitzgerald v. Rawlings*, 470.

JUDICIAL SALES.

See EQUITY, 4.

JUDGMENTS.

1. *Res judicata.*

A. rendered services for many years for his uncle, under a promise of compensation. Shortly before his death his uncle gave A. a check for about \$4,000, which was cashed. Afterwards A. brought suit against the administrator of his uncle's estate to recover for services rendered him, and in his account allowed a credit of \$4,000. At the trial of that suit the check was given in evidence and the jury rendered a verdict for the plaintiff for a part of his claim, upon which judgment was entered. *Held*, upon a bill by the administrator of the uncle alleging that the check had been obtained by A. by fraud and undue influence, that the indebtedness of the deceased and the validity of the payment on account had been established by that judgment, and the matter is now *res judicata*. *Stouffer v. Wolfkill*, 603.

LANDLORD AND TENANT.

1. *Purchase of demised property at tax sale by original lessee.*

A lessee who has covenanted to pay the taxes on the demised land, as well as the annual rent, cannot, by purchasing the property at a tax sale, made for non-payment of taxes, become the owner thereof as against the lessor, although he may have assigned the leasehold estate before the tax sale. *Christhilf v. Bollman*, 477.

2. In this case, after the lessee purchased the property at the sale for non-payment of the taxes which he had covenanted to pay, he conveyed it to his daughter. A bill by the owner of the rent alleged that the conveyance was made in pursuance of a scheme to defraud the plaintiff, and asked that the

LANDLORD AND TENANT—Continued.

sale and the deed from the collector to the lessee, as well as the deed from the lessee to his daughter, be declared null and void, and that the plaintiff be declared the owner of the reversionary interest in the land. *Held*, upon the evidence, that the plaintiff is entitled to the relief asked for. *Ibid*.

LATERAL SUPPORT.

See DAMAGES, 2.

MINES AND MINING.

MUNICIPAL CORPORATIONS, 5.

LIFE ESTATES.

1. Increase in value of property held in trust for life tenant with remainder over—Extra dividend on shares of stock owned by life tenant.

When a trustee is directed to pay the "interest or earnings" of the estate to a life tenant with remainder over of the principal, the life tenant is entitled only to the income, and an enhancement in the value of the estate is not a part of the interest or earnings. *Ex parte Humbird*, 627.

2. The direction in a will that a part of the testator's estate, amounting to a designated sum, shall be set aside and held in trust for life tenants, does not mean that the life tenants are entitled to any increase subsequently accruing in the value of the trust estate over and above the designated amount. *Ibid*.
3. When a life tenant is entitled to the interest and income on shares of stock in a corporation, and that corporation sells a part of the property in which its capital is invested and distributes the proceeds of the sale as a cash dividend, such dividend is a part of the corpus of the trust estate and is not income to which the life tenant is entitled. *Ibid*.
4. The exception to this rule is confined to cases in which the earnings of a corporation involve the conversion of its capital, as when the chief business of a corporation is to buy and sell land in which its capital is invested. *Ibid*.
5. A testator directed that \$700,000 of his estate should be held by trustees who should invest and reinvest the same and pay

LIFE ESTATES—*Continued.*

the interest or earnings thereof to his seven children for life with remainder to their respective heirs. One part of the property constituting the trust estate was an undivided interest in a tract of timber land in British Columbia, which cost the testator and the trustees about \$30,000. Afterwards this interest in the land was sold for \$85,000. *Held*, that this increase in the value of the trust estate belongs to the principal, and not to the life tenant. *Ibid.*

6. Another investment held by the said trustees was a number of shares of stock in a Canadian Lumber Company, upon which the payments made by the testator and the trustees after his death out of the corpus, amounted to \$196,000. The Lumber Company sold 52,000 acres of its land, which it had acquired as part of a larger tract made as an investment of its capital. The amount paid as a cash dividend to the trustees arising from this sale was \$676,000. The company had the power under its charter to buy and sell land, but its business had been confined to operating saw mills and the lumber business generally, and it had not engaged in buying and selling land. After the sale of the 52,000 acres, the Lumber Company retained land amounting in value to five times its capital stock. *Held*, that this cash dividend so paid to the trustees is not income or earnings of the investment, but belongs to the corpus of the estate as a result of an increase in its value. *Ibid.*

MANDAMUS.

1. To try title to public office.

The object of a writ of mandamus is to compel the performance of some act which the petitioner has a clear legal right to demand shall be done by the respondent, and when the petitioner has no other adequate remedy to enforce that right. *Hummelshime v. Hirsch*, 39.

2. A mandamus is the proper remedy to oust a person acting as a municipal officer from the office when he was not legally elected thereto, and to require him to vacate the same, since that is the performance of an act which the petitioner has a right to demand. *Ibid.*

MANDAMUS—Continued.

3. In this State the title of the respondent to an office may be tried in a mandamus proceeding where the petitioner claims title to the office and is not only seeking to oust the respondent, but also to obtain possession of the office. *Ibid.*

4. Parties.

When the object of a mandamus is to require a person acting as a City Councilman to vacate the office because he did not possess the statutory qualifications at the time of his election, it is not necessary that the petition should be filed against the Mayor and City Council to compel them to fill a vacancy on the ground that the respondent's election was void. *Hummelshime v. Hirsch*, 39.

5. Who may ask for writ.

A citizen and taxpayer of a municipality is entitled to apply for a mandamus to try the title to office of a City Councilman and to oust him therefrom on the ground of disqualification, although the petitioner does not himself lay claim to the office. *Hummelshime v. Hirsch*, 39.

6. Insufficient defenses to writ asking for ouster from office.

When a petition is filed by two persons asking for a mandamus to oust from a municipal office a person exercising its functions on the ground that he was not qualified at the time of his election, it is not a bar to the relief asked for that there is pending in Court an election contest between the respondent and one of the petitioners involving the claim of the latter to the office. *Hummelshime v. Hirsch*, 39.

7. It is not a sufficient answer to a petition for a mandamus to try the title of the respondent to a public office to allege that one of the petitioners for the writ was actuated by malice and ill-will towards the respondent in filing the petition. *Ibid.*

MASTER AND SERVANT.

1. Injury to operative in factory from revolving shaft—Duty of employer to cover dangerous machinery when practicable—Evidence—Assumption of risk—Contributory negligence.

In an action to recover damages for an injury caused to an employee in a factory by uncovered and rapidly revolving

MASTER AND SERVANT—*Continued.*

- shafting, evidence is admissible to show that it was practicable to cover the shafting, and as to what the general custom as to such covering is. *Dettering v. Levy*, 273.
2. In such action, evidence is admissible to show whether the force and effect of a rapidly revolving shaft are generally known to untrained persons, in connection with the questions of assumed risk and contributory negligence. *Ibid.*
 3. When women employees in doing their work are brought in proximity to a rapidly revolving shaft so that their clothing or hair may be caught by it if they happen to approach a few inches closer than their work ordinarily requires, it is the duty of the employer to cover or protect the shafting if such covering is practicable. *Ibid.*
 4. The rule that an employee assumes the risk of danger in his employment should be limited to risks which are obvious and which can be understood by an employee of ordinary intelligence, or at most to those which should be anticipated by the employee as the result of conditions which are obvious, or can reasonably be expected to be known by him. *Ibid.*
 5. Plaintiff was one of thirty-four women operating sewing machines at a long table in a straw-hat factory. Underneath the centre of the table, about eight inches from the floor and about twenty-three inches from the edge of the table, there was a rapidly revolving shaft which was uncovered between the pulleys on it, the distance between the pulleys being forty inches. Plaintiff got down on her hands and knees to look under the treadle for a tool, when her hair was caught on the shaft and her scalp was torn off. At different times before that, the skirts of the operators sitting at the table and using the treadles, had occasionally been caught in the shaft and torn off. There was no evidence to show that it would have been impracticable to cover the shafting between the pulleys. *Held*, that under these circumstances, the failure to protect the shafting is sufficient evidence of negligence on the part of the employer to be submitted to the jury. *Ibid.*
 6. *Held*, further, that since the plaintiff testified that she knew that it was dangerous to touch the shafting, but did not know that it would draw her hair when it was ten inches dis-

MASTER AND SERVANT—*Continued.*

tant therefrom, the plaintiff did not assume the risk of the danger which caused the injury. *Ibid.*

7. *Held*, further, that although the plaintiff could have borrowed the tool she was looking for at the time of the accident from another operative, or could have run a stick under the treadle to find it, she was not guilty of contributory negligence because she did not adopt one of these plans, but got down and looked under the table. *Ibid.*

MECHANICS' LIEN.

1. Contract for work made with owner and not contractor.

Upon a bill to enforce a mechanics' lien against a building for putting on it a tile roof, the claimant alleged that the owner and architect had ordered the work from him and promised to pay for it, while the owner of the building alleged that it had been ordered by the contractor, and that the contract for the roof had been made by the lien claimant with the contractor, and that since the claimant had not given to the owner the notice of his intention to claim the lien required by statute, the same was not enforceable against the building. *Held*, upon an examination of the evidence, that the claimant had made the contract for doing the work directly with the owner and not with the general contractor, and that consequently his claim is enforceable. *First Nat. Bank v. White*, 615.

MISTAKE.

See BANKS AND BANKING, 1.

MINES AND MINING.

1. Right of owner of surface land to subjacent support from owner of minerals under land—Removal of coal causing cracks in surface.

When one person owns the coal or other minerals in their natural bed under land, and another person owns the surface of the land, the latter has a right of subjacent support of the surface, and the owner of the minerals in removing them is bound to do so without injury to the surface or to the buildings on it. *Piedmont Coal Co. v. Kearney*, 496.

MINES AND MINING—*Continued.*

2. The right of the owner of the surface to support as against the owner of minerals may be modified by the expressed terms of the grant of the land to him. *Ibid.*
3. When a grant of land reserves to the grantor all coal and other minerals in the land, together with the right to mine and remove the same, the right of the grantee to subjacent support is not released or extinguished, either in express terms or by necessary implication. *Ibid.*
4. The owner of the coal is not liable to the owner of the surface for injuries resulting from the diversion of hidden or percolating streams caused merely by the removal of the coal. *Ibid.*
5. But if in removing the coal the surface of the land is made to crack in different places so that the rain runs into the crevices and the soil ceases to retain moisture, this loss of moisture diminishes the value of the land for agricultural purposes, and is an element of the damages which the owner of the surface is entitled to recover. *Ibid.*
6. When the evidence does not show that the removal of coal by a third party from land adjacent with the plaintiff's and on a lower level had any effect on plaintiff's land from beneath which plaintiff removed coal, a prayer is properly refused which instructs the jury that if plaintiff's land was liable to slip in that direction, and that the injury was caused by the working of the neighboring mine, then the plaintiff cannot recover. The prayer is also defective in that it does not exclude defendant's participation in the injury. *Ibid.*

MUNICIPAL CORPORATIONS.

1. **Liability of municipal corporation and its contractor for negligence in the construction of a sewer trench injuring adjoining house.**
- A count in a declaration against a municipality and its contractor for building a sewer which alleges that the defendant so located and constructed a sewer in the alley adjoining plaintiff's house that the earth supporting the walls of the house and its foundation settled and sank, whereby the house was injured, is bad on demurrer, since the defendants

MUNICIPAL CORPORATIONS—*Continued.*

had the right to construct the sewer, and this court does not charge that they did the work improperly or negligently. *Hanrahan v. Baltimore City*, 517.

2. Plaintiff's house, which was new and well built, abutted on an alley in which the defendants, a municipal corporation and its contractor, constructed a sewer. The trench for the sewer some eight feet ten inches deep was dug on the side of the alley nearest to plaintiff's house and about six feet from the wall. This trench was allowed to remain open its full length for more than three weeks, during which time there were several severe rainstorms and the water was not pumped out of the trench, but was allowed to stand until it soaked into the ground. After the earth was thrown back into the trench, an inch and a-half water pipe, which crossed the trench three feet below the surface adjoining plaintiff's house, was broken. Such pipes should be supported when the trench is filled, but this pipe was not supported, and it was broken by the weight of the earth thrown on it. Sheet piping or lagging was used in the construction of the trench and was left in it when it was filled. The failure to cut off the lagging below the surface allowed the water to run down behind it, making a cavity into which one witness, just before the trial, poured several buckets of water, which disappeared. After the construction of the sewer, the walls and ceilings of plaintiff's house began to crack and the cracks began to grow larger, and the rear wall fell out of plumb. *Held*, that this evidence is legally sufficient to show negligence on the part of the defendant in the construction of the sewer, resulting directly in injury to the plaintiff and that consequently it was error to instruct the jury that their verdict must be for the defendants. *Ibid.*
3. A municipal corporation is not liable for any and all damage that may result to a property owner from the construction of a sewer, but it is liable for its negligent or unskillful performance of the work. *Ibid.*
4. When a municipal corporation employs a contractor to build a sewer, under the supervision and control of a municipal official, the city is liable for any negligence of the contractor in the performance of the work. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

5. The right of an owner of land to lateral support may be asserted against a municipality making excavations in the adjoining street. *Ibid.*

See OFFICE AND OFFICERS.

NEGLIGENCE.

1. Accident at railroad crossing—Going under lowered safety gates.

Two girls, one twelve and the other sixteen years of age, walking along a street in a town, came to a railroad crossing where there were four parallel tracks. They found the safety gates lowered and a shifting engine was moving in front. When that engine stopped at the end of the crossing, the gates were not raised, but the watchman in charge stood leaning on them. The girls looked to see if a train was coming, but their view of the tracks in one direction was obstructed by the standing engine and cars attached to it. They then went under the lowered gates and crossed the first two tracks, but as they reached the third track a rapidly running train came along from the direction in which they had not been able to see. The older girl jumped back in time to avoid injury, but the younger one was struck and killed by the train. There was no evidence that those in charge of the train could have avoided the collision after seeing the girls. In an action to recover damages for the death so occasioned, *held*, that the jury was properly instructed to return a verdict for the defendant railway company, since it was not the duty of the watchman, after lowering the safety gates, also to warn the girls by word of mouth not to crawl under them, nor was he bound to anticipate that they would attempt to cross the tracks in the face of the danger signal of the lowered gates, and the injury was caused solely by the negligence of the deceased, who was acquainted with the crossing and of sufficient intelligence to know the meaning of the lowered safety gates. *Lilley v. P., B. and W. R. Co.*, 1.

- a. Liability of gas company for injury caused by escape of gas from street lamp owned by city.

When, in carrying out its contract with a city to supply gas to city lamps, a gas company distributes the gas through

NEGLIGENCE—*Continued.*

defective pipes, under its control and which it was bound to inspect and repair, and thus permits the gas to escape into streets and houses, the company is liable to anyone who may suffer injury in consequence of its failure to exercise due care to keep the pipes in repair and to discover leaks therein. *Consol. Gas. Co. v. Connor*, 140.

3. The defendant gas company, by its contract with the municipality of Baltimore, agreed to supply gas to street lamps owned by the city and to make connections by means of service pipes from its main pipes to the lamps, the city agreeing to pay a certain sum for each new lamp connected with the main. The contract did not expressly require the gas company to repair the service pipes, but both parties treated the duty to do so as devolving on the company. Whether the service pipes were owned by the city or by the company is not clearly shown. Plaintiffs were made ill by an escape of gas from a city lamp placed in front of the house they occupied, and brought these actions against the gas company to recover damages therefor. For three or four days prior to the injury a constantly increasing odor of gas was perceived in the street, and the lamp referred to could not be lighted. The gas company was notified, and its employees examined the locality without discovering the leak. After the injury to the plaintiffs, these employees dug up the soil at the base of the lamp-post, and discovered the leak in the fitting which joined the horizontal pipe laid from the main to the lamp-post with the vertical pipe rising up through the interior of the post. *Held*, that whether the service pipe belonged to the city or not, it was the duty of the gas company to see that it was kept in repair. *Ibid*.
4. *Held*, further, that the evidence was legally sufficient to show that the defendant company was negligent in failing to discover and repair the leak in the pipe, and that it was for the jury to say as matter of fact whether the examination made by it which failed to discover the leak was a due examination. *Ibid*.
5. *Held*, further, that although in supplying gas the company was acting under a contract with the city, it is liable to third

NEGLIGENCE—*Continued.*

persons for its misfeasance in the performance of that duty by which injury was occasioned. *Ibid.*

6. Sufficiency of declaration.

The declaration in this case charged that the defendant was negligent in failing to repair its pipes. The jury was instructed that they might render a verdict for the plaintiff if they found that by reason of its failure to use due care, the gas supplied by the defendant leaked or escaped from its pipes or from pipes which in the operation of its business it used and assumed the duty of repairing. *Held*, that the declaration is sufficient to cover both the theory of ownership of pipes by the city and the theory of the defendant's assumption of their control and repair. *Ibid.*

7. Accident at street railway crossing—Contributory negligence—Failure to avoid injury after seeing plaintiff's peril—Instructions.

Even if a plaintiff was guilty of contributory negligence in attempting to cross a street in front of an approaching electric car, he is nevertheless entitled to recover damages for an injury caused by collision with it, if the motorman could, by the exercise of due care, have avoided the accident after he saw, or, by the exercise of proper care, might have seen, the plaintiff as he was about to cross the tracks. *United Rys. Co. v. Kolken*, 160.

8. In the application of this rule, it makes no difference whether the plaintiff's negligence consisted of venturing to cross the street without looking to see if a car was coming or in attempting to cross after seeing an approaching car. *Ibid.*

9. In the running of electric cars on city streets, a motorman is required to anticipate the conduct of pedestrians crossing the streets to the extent of keeping a sharp lookout, giving proper warning and reducing the speed of the car so as to have it under control for the purpose of avoiding injury to those who may be on the crossing. *Ibid.*

10. In an action to recover damages for an injury caused by plaintiff's being struck by defendant's street railway car at a street crossing, the plaintiff's evidence was to the effect that as she was about to start across a street on which were

NEGLIGENCE—Continued.

defendant's tracks, at a corner crossing, she saw a car coming slowly, which was then about two hundred feet distant; that the view was unobstructed and she started across without looking again, and was struck when she reached the track, thrown on the fender and carried for some distance before being thrown off. Other witnesses testified that the speed of the car was increased as it approached the crossing, and when it reached there was going at full speed; that the motorman was looking at people on the sidewalk and did not ring the bell, or check the speed of the car until after the plaintiff was struck. The evidence on the part of the defendant was that the car was going slowly and the bell was rung. *Held* that prayers offered by the defendant were properly rejected which instructed the jury that there was no legally sufficient evidence of negligence on the part of the defendant, and that the plaintiff was guilty of such contributory negligence as to bar her recovery. These prayers ignore the plaintiff's evidence, that the motorman had a clear view of the crossing; that he was not looking ahead; that he did not ring his bell, and that the car was running at full speed when it reached the crossing and struck the plaintiff. *Ibid.*

11. Duty to look and listen till reaching railway track—Negligence of driver at crossing.

The rule that when the view of the tracks at a railway crossing is obstructed, it is the duty of a person about to go upon them to stop, look and listen for approaching trains, is not complied with by doing so at a point where obstructions prevent him from seeing, and when, if he had stopped nearer the track in a place of safety, he could have seen and heard the train. It is, in such case, the duty of the driver to continue to look until he reaches the track. *Brehm v. P., B. and W. R. Co.*, 302.

- 12.** The driver of a wagonette drawn by two horses and containing seven persons approached a railway crossing in the country. Both the road on which he was driving and the railway tracks were in cuts near the crossing. The driver knew that trains were frequently running there at high speed and was well acquainted with the dangerous character of the crossing. When the horses reached the track they were struck by a fast

NEGLIGENCE—*Continued.*

train and killed, but the persons in the wagon were not seriously injured. In an action to recover damages, the plaintiff's evidence was that no whistle or bell was sounded for the train; that the driver stopped thirty feet from the crossing and looked and listened, without hearing a train, and that then he drove rapidly on the crossing. The evidence in the case established that from the point where the driver testified that he stopped, in the cut, neither he nor his passengers could see a train coming from the north except for a short distance, but that, beginning at a point twenty feet from the nearest track, there was a clear view up the track for over a mile. *Held*, that the driver was guilty of gross negligence in driving rapidly over the crossing after he had only stopped and looked for a train at a point whence it could not be seen, and when it could have been seen and heard from a safe place nearer the track if he had then looked and listened. *Ibid.*

13. Collision at electric railway crossing in open country—Contributory negligence.

An old man driving a cart on a road running through open fields to a garbage dump came to a point where the road crossed the double tracks of the defendant electric street railway. He testified that he looked to see if a car was approaching from either direction, but not seeing or hearing any, drove on, and that the wheel of his cart, when it was on the first track, was struck by a car and the injuries inflicted upon him to recover for which this suit was brought. The accident occurred in broad daylight, and both the plaintiff and the motorman in charge of the car had an unobstructed view of each other. *Held*, that, if it be assumed that there was some evidence of negligence on the part of the defendant, yet the plaintiff's contributory negligence was such as to bar the right to recover, since he could have seen the approaching car for a distance of more than five hundred feet, and if he looked and saw it he was negligent in attempting to cross in front of it; and if he did not see it, it must have been because he did not really look, and it was negligence to start across the track without looking to see if a car was coming. Under these circumstances the motorman had a right to assume, if

NEGLIGENCE—Continued.

he saw the plaintiff approaching the track, that he would not attempt to cross in front of a rapidly approaching car. *Sparr v. United Rys. Co.*, 316.

14. In making excavation on adjoining land.

The duty of the owner of a house to shore or prop his land after notice when excavations are made adjoining it, does not require him to guard against the negligence of the other party in making the excavations. *Hanrahan v. Baltimore City*, 517.

15. Sufficiency of evidence.

In an action charging that defendants' negligence caused the injury complained of, the case should be submitted to the jury if the plaintiff's evidence be such that the fact of negligence can be fairly and rationally inferred from it. That evidence need not point unavoidably and unerringly to defendants' negligence. *Hanrahan v. Baltimore City*, 517.

16. Injury to person on private right of way of railroad company by engine running backward—Knowledge of perilous situation of the trespasser.

In an action to recover for injury inflicted upon a person who was at the time on the private right of way of the defendant railroad company, evidence is inadmissible to show that people generally were accustomed to cross the tracks of the defendant in that vicinity. The fact that the railroad company fails to prohibit the public from going on its tracks does not create a right in the public to do so, nor impose on the company an obligation to make special provision for the protection of such trespassers. *Balto. and Ohio R. Co. v. Welch*, 536.

17. The provision of Baltimore City Code, Art. 30, sec. 14, requiring a lookout to be stationed on the rear of the tender of a locomotive going backwards within the city limits has been previously held to be obsolete; and therefore that municipal regulation is not admissible in evidence in an action to recover damages for a collision between the tender of a locomotive and a trespasser on the tracks. *Ibid.*

18. Defendant company's engine and tender were running back slowly at the speed of about two miles an hour on de-

NEGLIGENCE—*Continued.*

defendant's private right of way. A city street ran to the tracks at that point, but did not extend across them. At a place on the tracks near that street, a boy, fourteen years old, was struck by the tender and killed. In an action for damages therefor, one of the plaintiff's witnesses testified that when the engine was a block and a-half away he saw that the boy's foot was caught and held between the switch point and the rail; that the boy was screaming and trying in vain to pull his foot loose, but was held fast until he was struck. Other witnesses for plaintiff did not see the boy until the engine was almost upon him. The defendant's witnesses, being the persons on the engine, testified that they looked back in the direction it was going and did not see the boy. *Held*, that if it be conceded that the boy was a trespasser on the track and the employees of the defendant in charge of the backing engine owed him no duty until they became aware of his presence on the track in a position of danger, yet the evidence is such that the case should have been submitted to the jury, since the plaintiff's evidence is legally sufficient to show that the defendant's agents were made aware of the boy's perilous situation in time to avoid the injury by the exercise of ordinary care. *Ibid.*

19. *Held*, further, that a prayer offered by the defendant is erroneous which assumed that the duty of the defendant's servants to exercise care to avoid injury to the boy began only when they *saw* his danger. Under the plaintiff's evidence they could have been informed of his peril by his cries of distress before they saw him. *Ibid.*
20. *Held*, further, that a prayer offered by the plaintiff is erroneous which instructs the jury that if they find that persons were accustomed to cross the tracks of the defendant at that point, it was the duty of the defendant's agents to keep a lookout for them and exercise special care for their protection. The duty of railroad agents to look out for and exercise care to avoid injury to persons at railway crossings and upon public highways, where such persons have a right to be and may be expected to be found, is different from the care required of them in regard to the presence of trespassers on

NEGLIGENCE—*Continued.*

railway tracks where they have no right to be and where they are not expected to be found. *Ibid.*

See MASTER AND SERVANT.

MUNICIPAL CORPORATIONS, 2.

OFFICE AND OFFICERS.

1. Qualifications of City Councilman—Payment of taxes.

The Charter of the City of Cumberland (Act of 1910, Chap. 306) provides, in addition to an age and residence qualification, that "each Councilman shall be the *bona fide* owner of property to the value of \$500 and assessed for the same on the tax books of said city at the time of their election and for two years next prior thereto, the taxes on which shall not be in arrears." *Held*, that this provision as to payment of taxes relates to the time of election of a Councilman and not to the time of his qualification by taking the oath of office, and that consequently where a candidate for the office of Councilman was in arrears as to the taxes on his property on the day of his election, but paid the same afterwards, he is not entitled to the office. *Hummelshime v. Hirsch*, 39.

2. The said Charter of Cumberland provides that the candidates to be voted for at an election for the City Council shall be selected at a primary election after the filing of an affidavit by them that they are qualified to hold the office, and that each Councilman shall be assessed on property to a certain amount at the time of the election, the taxes on which shall not be in arrears. The taxes on the property of a candidate for the Council were in arrears on the day of the election, but at three o'clock in the afternoon of that day he endeavored to pay them, but could not find the tax collector. *Held*, that even if he had paid the taxes at that time it would not have been sufficient to qualify the candidate, since it was the purpose of the charter that only those candidates who possessed the required qualification should be voted for at the election. *Ibid.*

See CONSTITUTIONAL LAW, 1.

MANDAMUS, 1.

ORPHANS' COURT.

See EXECUTORS AND ADMINISTRATORS, 1.

PERPETUITIES.

See DEVISE AND LEGACY, 4, 9.

GIFTS, 3.

PLEADING.

See NEGLIGENCE, 6.

POLICE.

See CONSTITUTIONAL LAW, 1.

PRACTICE.

1. Instruction referring to the pleadings.

A prayer instructing the jury that "under the pleadings and evidence in the case" the plaintiff is not entitled to recover does not raise the question of the legal sufficiency of the evidence but relates to the sufficiency of the declaration. *Sumwalt Co. v. Knickerbocker Co.*, 403.

2. Offering evidence after rejection of prayer withdrawing case.

When at the close of plaintiff's evidence the defendant offers prayers withdrawing the case from the jury, which are rejected by the Court, and the defendant elects to go on and offer testimony in defense, that testimony must be considered for the purpose of determining whether the plaintiff's evidence is legally sufficient to go to the jury. *Balto. and Ohio R. Co. v. Welch*, 536.

PRINCIPAL AND SURETY.

1. Delay in enforcing liability of principal debtor—Extending time of payment—Pleas.

A creditor may voluntarily forbear the prompt enforcement of his claim against the principal debtor without losing his right to resort to the surety. *Berman v. Elm Loan Ass'n.*, 191.

2. In order to discharge a surety, it must be shown that the indulgence given by the creditor to the principal debtor was in pursuance of a definite agreement between them made upon a consideration, and such as would prevent the creditor from

PRINCIPAL AND SURETY—Continued.

- enforcing payment of the debt before the expiration of the extended time. *Ibid.*
3. A surety may, as a condition of becoming such, stipulate with the creditor for diligence in enforcing payment of the debt by the principal debtor, and if, after such stipulation, the creditor fails to exercise diligence, the surety will be discharged. *Ibid.*
 4. Defendant was surety on a bond conditioned for the payment of a mortgage debt by a third party to the plaintiff. In an action on the bond, alleging non-payment of the mortgage, a plea is good on demurrer which alleges an agreement by the plaintiff with the defendant as a condition of his signing the bond sued on, that the plaintiff would diligently enforce payment and performance of the covenants of the mortgage, and alleging that the plaintiff had neglected to enforce such payment for about fifty weeks, whereby the mortgagor did not pay in full. *Ibid.*
 5. Another plea in said action alleging that the plaintiff for a moneyed consideration agreed with the debtor to extend the time of payments, sets up a good defence. *Ibid.*

RAILROAD COMPANIES.**1. Tracks in street cutting off access to abutting land.**

Plaintiff was the owner of a lot of ground abutting for about three hundred feet on a public street in Baltimore City, the bed of which was owned by the municipality. The lot was unimproved and unused and was elevated above the street level. The street itself was not used as such and was not curbed. Three tracks of the defendant railroad company were laid on the street, leaving a space of about twenty-four feet in front of plaintiff's lot between the nearest track and where the curb would be. When that was the situation of the property, the defendant company, acting under the authority of a municipal ordinance, laid on the street an additional track, leaving between it and the sidewalk line in front of plaintiff's lot only a space of some ten feet, and also raised the roadbed of the street, the result of which was to make impossible any use of the street at that point. In an action

RAILROAD COMPANIES—*Continued.*

to recover damages for the injury to his land so caused, the plaintiff's evidence was to the effect that his lot had a certain market value before the construction of the additional track; that such construction destroyed access from the street, and in order to obtain access, it would be necessary to devote a part of the lot to that purpose, and that the land remaining afterwards would have a certain market value less than previously. *Held*, that the plaintiff is entitled to recover damages for the injury to his property thus caused; that this evidence is legally sufficient to show the extent of his loss, and that it was not necessary for the plaintiff to prove a diminution in the rental value of the lot, but that proof of the diminution of its market value is sufficient. *Webb v. Balto. and Ohio R. Co.*, 216.

See EMINENT DOMAIN, 1, 3.

NEGLIGENCE.

RELIGIOUS SOCIETIES.

See GIFTS, 3.

REPLEVIN.

1. Right of possession.

To maintain an action of replevin, the plaintiff must show that he was entitled to possession of the property at the time of the issuing of the writ. *Balto. and Ohio R. Co. v. Rueter*, 687.

2. The fact that the plaintiff may have obtained naked possession of the goods prior to the issuing of the writ, of which he was afterwards deprived, does not show that he was entitled to possession at the time the writ was issued. *Ibid.*
3. When the defendant in an action of replevin had first agreed to surrender the goods to the plaintiff and afterwards changed his mind, alleging a mistake as to plaintiff's right, that agreement does not show that the plaintiff was entitled to possession when the writ was issued. *Ibid.*

See APPEAL, 9.

BILL OF LADING, 6.

RES JUDICATA.

See JUDGMENTS, 1.

RESTRICTIONS.

See DEEDS, 1.

EMINENT DOMAIN, 3.

SALES.

1. Implied warranty of fitness.

When a buyer orders articles not manufactured by the seller, and he has an opportunity to inspect the same before using them, there is no implied warranty of their quality. And if he returns to the seller some of the articles delivered because of defects, he is not entitled, in an action against him, to recover the price of those not returned, to recoup any damages arising from the return of the defective articles. *Commercial Realty Co. v. Dorsey*, 172.

2. Right to reject article not according to description.

When a purchaser orders from a manufacturer goods of a described kind, which are known in the trade to possess certain qualities, the same being a material part of the description, he is entitled to reject goods offered which do not possess those qualities. *Enterprise Mfg. Co. v. Oppenheim*, 368.

See BILLS AND NOTES, 4.

CONTRACTS, 6.

SAVINGS BANKS.

See GIFTS, 1.

SCHOOLS.

1. Board of School Commissioners of Baltimore City not authorized to appoint probationary teacher subject to dismissal.

The Board of School Commissioners of Baltimore City has the power under Local Code, Art. 4, sec. 99, to subject a candidate for the position of teacher in the public schools to the test of actual work in teaching in order to ascertain his aptness to teach, as a part of the examination of such candidate.

SCHOOLS—*Continued.*

But the Board is not authorized to appoint a candidate as a probationary teacher for one year, making the appointment subject to cancellation during that year. The Board can only appoint regular teachers upon the nomination of the Superintendent of Instruction after an examination as to the fitness of the candidate. *Semmes v. Rowland*, 260.

2. Local Code of Baltimore City, sec. 99, provides that the Board of School Commissioners shall confirm or reject all nominations of teachers in the public schools made to it from graded lists by the Superintendent and his assistants, and that any teacher may be removed by said Board on the recommendation of the Superintendent after charges preferred and trial had. A resolution adopted by the School Board directed that no candidate should be appointed a regular teacher whose aptness to teach had not first been tested by the Superintendent during a probationary period of twelve months prior to such appointment. The petitioner in this case was appointed by the Board a teacher in the schools under the condition that her aptness to teach be made manifest by her work during twelve months, and that if, during that period, her work should be deemed unsatisfactory by the Superintendent, the appointment should be subject to cancellation, on ten days' notice. This appointment was made without a nomination to the Board by the Superintendent. Before the end of the twelve months' period, the petitioner was notified by the Board that the Superintendent had reported her work as teacher to be unsatisfactory, and that her appointment was cancelled. She then filed the petition in this case alleging that she had been removed as teacher without charges having been preferred against her and a trial had; that the Board had no power to make a conditional appointment of her as a probationary teacher, and that since the condition was void, she was a regular teacher and could be removed only in the manner prescribed by statute. *Held*, that the appointment of the petitioner was void, not only for the want of a preceding nomination, but because of the condition contained in the appointment, it not being within the power of the Board to make such conditional appointment, and that since the appointment was void, the petitioner never became a teacher

SCHOOLS—Continued.

within the meaning of the statute, and that consequently she was not entitled to have charges preferred against her and a trial had before the Board could refuse to permit her to teach in the schools. *Ibid.*

SEWERS AND DRAINS.

See EVIDENCE, 9.

INJUNCTIONS, 1.

MUNICIPAL CORPORATIONS, 2, 3.

SPECIFIC PERFORMANCE.**1. Misrepresentation as to subject-matter—Title of vendor.**

Specific performance will not be decreed of a contract to purchase land when the defendant was induced to enter into it on account of misrepresentations as to the extent or boundaries of the land, although such misrepresentations were made in good faith and without knowledge on the part of the vendor of their inaccuracy. *Ginther v. Townsend*, 122.

2. Defendant agreed to buy a tract of land known as the M. farm, paid part of the purchase money, agreed to give a mortgage for the balance when the deed was executed to him, and entered into possession. At the time the agreement was made, the vendor pointed out the lines of the farm and said that it bounded for some distance on a county road. It was agreed that the deed to be executed would contain an accurate description, after a survey should be made. The survey disclosed the fact that the boundary of the farm fell short of extending to the county road by several hundred yards. *Held*, that on account of this misrepresentation as to the subject-matter, the contract of purchase should not be specifically enforced. *Ibid.*

3. Bill by heirs of contractor.

When a party whose interest in certain land is defeasible in the event of his death without issue, a contract to sell the land in fee simple is not enforceable by his heirs at law after his death. *Ginther v. Townsend*, 122.

SUMMONS.

See WRITS.

TAXATION.

**1. Taxation of property in this State owned by non-resident—
Validity of statute requiring custodian of distilled spirits to pay taxes.**

Although it has been held that under the Declaration of Rights, Art. 15, taxes are levied *in personam* and not *in rem*, yet the custodian in this State of property owned by a non-resident may be required to pay the taxes on such property, when he is allowed a lien on the same for his reimbursement. That is not a taking of property without due process of law within the meaning of the Federal Constitution. *Hannis Distilling Co. v. Baltimore City*, 678.

2. It is not essential to the exercise of the power to tax the owner of property *in personam* that it should be exerted directly against him by name. *Ibid.*
3. A foreign corporation doing business in this State is subject to the provisions of Code, Art. 81, secs. 214 *et seq.*, which require every warehouse company to pay a tax on the distilled spirits in its possession by whomsoever owned, although the owner be not identified. Those provisions do not require the assessment of the tax to be made in the name of the owner. *Ibid.*

TAX SALES.

See LANDLORD AND TENANT, 1.

TROVER.

1. For conversion of shares of stock—Instructions.

Trover lies to recover damages for the conversion of shares of stock. *Jones v. Ortel*, 205.

2. Plaintiff gave to defendant a certificate for forty shares of stock in a mining company, endorsed in blank, with directions to have it sold for not less than \$13.50 per share. Subsequently the plaintiff demanded the return of the stock, without getting it. More than a year afterwards, the defend-

TROVER—Continued.

ant offered to the plaintiff a certificate for forty shares of stock which had been issued in the defendant's name. Plaintiff refused to accept this. In an action of trover, alleging a conversion of the shares so delivered to the defendant, there was evidence tending to show that the defendant had sent the stock to a broker in New York, by whom it was sold after plaintiff had demanded its return, and that the defendant had received the benefit of the broker's act. The trial Court instructed the jury that if they found that the plaintiff delivered the shares of stock to the defendant to be sold by him for the plaintiff at not less than \$13.50 per share in cash, and that thereafter the plaintiff demanded the return of said stock or the said price thereof, and that the defendant refused to return the stock, then the plaintiff is entitled to recover such sum as the jury may find to be the value of the stock at the time of demand and refusal. *Held*, that the defendant is not entitled to except to this prayer on the ground that there was no evidence that he was directed to sell for cash, since a sale is presumed to be for cash unless otherwise provided. *Ibid*.

3. *Held*, further, that although according to the evidence, the plaintiff demanded the return of the stock, and not the sum of \$13.50 per share, the defendant was not injured by the assumption in the prayer that the plaintiff demanded either the stock or its said value. *Ibid*.
4. Demand and refusal evidence of conversion.

When the evidence in the case is sufficient to show that at the time the plaintiff demanded from the defendant the return of his property, the latter had it within his power to return the same, then the refusal to do so is evidence of a conversion of the property by the defendant sufficient to support an action of trover. *Jones v. Ortel*, 205.

TRUSTS AND TRUSTEES.

See DEVISE AND LEGACY, 7.

EQUITY, 4.

GIFTS, 3.

LIFE ESTATES, 3, 4.

VENDOR AND PURCHASER.**1. Costs of suit—Interest and taxes.**

When a suit in equity and a decree is necessary to make good the title to property sold by a corporation in order to discharge the lien on it of preferred stock, and the corporation files a bill for specific performance of the contract to buy it, the purchaser should not be subjected to the costs of the case below or on appeal, and interest on the purchase money and taxes on the property should be adjusted as of the date of the decree in this Court. *Leviness v. Consol. Gas Co.*, 559.

2. Time not of the essence of contract for the sale of land—Right to rescind.

In a contract for the sale of land time is not generally of the essence, so as to authorize the vendor to rescind the contract for a failure of the purchaser to make payment at the time fixed. *Diamond v. Shriver*, 643.

3. When a contract for the sale of land provides that the balance of the purchase money shall be paid either within ninety days from date, or upon delivery of a deed conveying the land, free of encumbrances, the vendor is not authorized to rescind the contract, about a month after the expiration of the ninety days, for non-payment of the balance of the purchase money, especially where the vendor was not previously able to make a conveyance free from encumbrances, and when, after an attempted rescission, the purchaser had tendered the full amount of the purchase money. *Ibid.*

4. An allegation that the execution of a contract had been obtained by means of false representations made by the purchaser, held not to be supported by the evidence. *Ibid.*

WAIVER.

See **CONTRACTS**, 7, 10, 21.

DEEDS, 1.

WILLS.**1. Validity of will of leasehold property executed by an infant.**

Code, Art. 93, sec. 316, provides that no will, testament or codicil shall be good and effectual to pass any interest or estate in any lands, tenements, or incorporeal hereditaments unless

WILLS—*Continued.*

the person making the same, if a male, be of the full age of twenty-one years, and, if a female, of the full age of eighteen years. *Held*, that this provision has relation to freehold estates in land, and that since a leasehold estate is a chattel, a will bequeathing the same, executed by a male nineteen years of age and of sufficient discretion, is valid. *Holzman v. Wager*, 322.

2. The circumstance that the owner of a leasehold interest in land has the option of redeeming the rent and acquiring the fee simple does not constitute such leasehold interest an estate in land within the meaning of Code, Art. 93, sec. 316. *Ibid.*
3. A male infant over the age of fourteen years, if of sufficient discretion, may make a valid will of personal property. *Ibid.*
4. **Devisee of land may be attesting witness of the will.**

A devisee of land who is one of the attesting witnesses of the will is a competent witness to prove the will, and the devise to him is valid. *Leitch v. Leitch*, 336.

5. The provision of the statute of 25 George II, Ch. 2, formerly in force in Maryland, to the effect that a devise to an attesting witness shall be void, was repealed, because inconsistent with and omitted from, the Act of 1798, Ch. 101 (Code, Art. 93, sec. 317), providing merely that all devises of land shall be attested and subscribed in the presence of the testator by two or more credible witnesses, and under the Evidence Act of 1864, Ch. 109 (Code, Art. 35, sec. 1), which removes the disqualification of witnesses to testify on account of interest, a party who takes a benefit under a will is competent to prove it. *Ibid.*
6. **Invalidity of will subscribed by only one witness.**

While a man was lying ill on a bed in a hospital, and just before he was taken to the operating room, he asked the attending physician for a piece of paper and pencil, and wrote a short testamentary disposition of his property. He handed the paper to the physician and asked him to sign it, which was done. Then he gave the paper to the petitioner, who was at hand, in the presence of other persons, who knew that the paper was a will. The man died after the operation. *Held*, that this paper cannot be admitted to probate as a will,

0059 13

